

licenses and identify the time and place of an auction in the event that mutually exclusive applications are filed. The Public Notice also will specify the method of competitive bidding to be used, including applicable bid submission procedures, stopping rules and activity rules, as well as the deadline by which short-form applications must be filed, and the amounts and deadlines for submitting the upfront payment. See Second Report and Order at ¶ 164. We will not accept applications filed before or after the dates specified in Public Notices. Applications submitted before release of a Public Notice announcing the availability of particular license(s), or before the opening date of the filing window specified therein, will be returned as premature. Applications submitted after the deadline specified by Public Notice will be dismissed, with prejudice, as untimely. Soon after release of the initial Public Notice, an auction information package will be made available to prospective bidders.

62. Bidders will be required to submit short-form applications on FCC Form 175 (and FCC Form 175-S, if applicable), together with any applicable filing fee³⁸ by the date specified in the initial Public Notice.³⁹ The short-form applications will require applicants to provide the information required by Section 1.2105(a)(2) of the Commission's Rules, 47 C.F.R. § 1.2105(a)(2). Specifically, each applicant will be required to specify on its Form 175 applications certain identifying information, including its status as a designated entity (if applicable), its classification (*i.e.*, individual, corporation, partnership, trust or other), the markets and frequency blocks for which it is applying, and assuming that the licenses will be auctioned, the names of persons authorized to place or withdraw a bid on its behalf. In addition, applicants will be required to provide detailed ownership information (see Section 24.813(a) of the Commission's Rules, contained in Appendix B hereto) and identify all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Applicants will also be required to certify that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. In addition, applicants for licenses in the

³⁸ Because Section 8 of the Communications Act, 47 U.S.C. § 158, does not currently afford the Commission authority to charge an application fee in connection with PCS applications, broadband PCS applicants will not be required to submit a fee with their short-form application. However, the Commission has requested that Congress amend Section 8 of the Communications Act to provide a specific application fee for PCS services. If the Commission receives application fee authority, the general rules governing submission of fees will apply. See 47 C.F.R. § 1.1101 *et seq.* These rules currently provide for dismissal of an application if the application fee is not paid, is insufficient, is in improper form, is returned for insufficient funds or is otherwise not in compliance with our fee rules. Whenever funds are remitted to the Commission, applicants also must file FCC Form 159.

³⁹ Applicants should submit one paper original and one microfiche original of their application, as well as two microfiche copies.

entrepreneurs' blocks will be required, as part of their short-form applications, to certify that they are eligible to bid on and win licenses in those blocks. Among other things, this means that they are in compliance with our PCS-cellular and PCS-PCS cross-ownership limitations. As we indicated in the Second Report and Order, if the Commission receives only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, the Commission by Public Notice will cancel the auction for this license and establish a date for the filing of a long-form application, the acceptance of which will trigger the procedures permitting petitions to deny. See Second Report and Order at ¶ 165.

63. A number of commenters in this proceeding objected to our original tentative conclusion that short-form applications should be judged by a letter-perfect standard. See NPRM at ¶ 100. Parties proposed that the Commission allow a brief period for correcting errors in short-form applications. See, e.g., comments of AT&T at 30-31, BellSouth at 36-37. As we stated in the Second Report and Order, we believe that the public interest would be better served by encouraging maximum bidder participation in auctions. See Second Report and Order at ¶ 167. Therefore, we will provide applicants with an opportunity to correct minor defects in their short-form applications (e.g., typographical errors, incorrect license designations, etc.) prior to the auction. Applicants will not be permitted until after the auction, however, to make any major modifications to their applications, including cognizable ownership changes or changes in the identification of parties to bidding consortia. In addition, applications that are not signed will be dismissed as unacceptable.

64. After reviewing the short-form applications, the Commission will issue a second Public Notice listing all defective applications, and applicants whose applications contain minor defects will be given an opportunity to cure defective applications and resubmit a corrected version.⁴⁰ After reviewing the corrected applications, the Commission will release a third Public Notice announcing the names of all applicants whose applications have been accepted for filing. These applicants will be required to submit an upfront payment to the Commission, as discussed below.

B. Upfront Payment

65. The comments in this proceeding generally supported the Commission's proposal to require prospective bidders to make substantial upfront payments prior to auction. See, e.g., comments of Comcast at 18, PacBell at 28, Nextel at 16, and AWCC at 31-32. Consistent with the weight of the comments, we concluded in the Second Report and Order that a substantial upfront payment prior to the beginning of an auction is necessary to ensure that only serious and qualified bidders participate. See Second Report and Order at ¶ 171. By requiring such a payment we also help to ensure that any bid withdrawal or default penalties are paid. These considerations apply to broadband PCS auctions. We will therefore

⁴⁰ On the date set for submission of corrected applications, applicants that on their own discover minor errors in their applications also will be permitted to file corrected applications.

require all broadband PCS auction participants to tender in advance to the Commission a substantial upfront payment as a condition of bidding.

66. In the Notice, we proposed to require upfront payments based on a \$0.02 per MHz per pop formula. Though some commenters favor a fixed upfront payment set by the Commission prior to the auction,⁴¹ most support the Commission's proposed \$0.02 per MHz per pop formula, which would enable prospective bidders to tailor their upfront payment to their bidding strategies.⁴² Commenters suggest that there should be some fixed minimum on the amount of upfront payment made prior to auction (suggestions range from \$2,500 to \$100,000 for different services).⁴³ Some commenters also favor setting a maximum upfront payment, pointing out that our proposed formula yields very high payments in the broadband PCS context.⁴⁴

67. We believe that the standard upfront payment formula of \$0.02 per pop per MHz for the largest combination of MHz-pops a bidder anticipates bidding on in any single round of bidding is appropriate for broadband PCS services.⁴⁵ Using this formula will provide bidders with the flexibility to change their strategy during an auction and to bid on a larger number of smaller licenses or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed that amount covered by the upfront payment. For example, when we auction licenses covering the nation simultaneously, a bidder would not be required to file an upfront payment representing national coverage unless it intended to bid on licenses covering the entire nation in a single bidding round. The \$0.02 per MHz per pop formula also works well with the Milgrom-Wilson activity rule that we plan to employ in broadband PCS auctions, as described in Section III above. In the initial Public Notice issued prior to each auction, we will announce population information corresponding to each license to enable bidders to calculate their upfront payments.

⁴¹ See, e.g., comments of Edward M. Johnson at 2; and LuxCel Group, Inc. at 8.

⁴² See, e.g., comments of PacBell at 28; Telocator (now PCIA) at 13; CTIA at 30; and Rochester Telephone Corporation at 13.

⁴³ See, e.g., comments of Telocator at 20-21; Cellular Communications, Inc. at 15; AT&T at 34; and BellSouth at 41.

⁴⁴ See, e.g., comments of Southwestern Bell at 38-40 (arguing generally for a maximum deposit of \$50 million for all markets) and AT&T at 34 (supporting a maximum upfront payment of \$5 million, with a down payment following the auction).

⁴⁵ As discussed in Section VII, *infra*, designated entities will be subject to a lesser upfront payment requirement of \$0.015 per MHz per pop. Further, we retain the flexibility to consider using a simpler payment requirement if circumstances warrant.

68. As we indicated in the Second Report and Order, we will not set a maximum on upfront payments.⁴⁶ We decline to do so because we wish to ensure that those bidding on large numbers of valuable broadband PCS licenses are bidding in good faith and are financially capable of constructing those systems quickly. We recognize that upfront payments for broadband PCS licenses may amount to millions of dollars, but we do not believe that it is unreasonable to expect prospective bidders to tender such sums given the expected overall value of some of these licenses and the expected financial requirements to construct the systems. Indeed, such a requirement is necessary to ensure the seriousness of bidders for these valuable licenses.

69. In the Second Report and Order, we accepted commenters' suggestions and established a general minimum upfront payment of \$2,500 to ensure that the use of our preferred formula would result in a substantial enough payment that bidders would be deterred from making frivolous bids.⁴⁷ Such a minimum upfront payment is needed in connection with auctions where the \$0.02 per MHz per pop formula would yield a comparatively small upfront payment (such as those for narrowband PCS licenses in BTAs). Because of the wider bandwidth of broadband PCS licenses, however, this minimum upfront payment will not be relevant in auctions for this service.⁴⁸

70. For broadband PCS auctions, we will follow the procedures for submission of upfront payments outlined in the Second Report and Order. Applicants whose short-form applications have been accepted for filing will be required to submit the full amount of their upfront payment to the Commission's lock-box bank by a date certain, which will be announced in a Public Notice and generally will be no later than 14 days before the scheduled auction.⁴⁹ After the Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission will issue a Public Notice announcing the names of all applicants that have been determined to be qualified to bid. An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any license being auctioned will not be identified on this Public Notice as a qualified bidder, and it will

⁴⁶ See Second Report and Order at ¶ 179.

⁴⁷ Id. at ¶ 180.

⁴⁸ The smallest bandwidth that a broadband PCS licensee will be authorized to use is 10 MHz, so a \$2,500 upfront payment would result for a license area with a population of only 12,500 persons. The least populous BTA in the United States (Williston, North Dakota) has a population of approximately 27,500, and the upfront payment for a 10 MHz license in that BTA would be approximately \$5,500.

⁴⁹ Upfront payments must be made by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

be prohibited from bidding in the auction. That is, we will require that applicants for broadband PCS licenses submit a sufficient upfront payment to reflect the MHz-pops of the smallest license being put up for bid in a particular auction.⁵⁰

71. Although it would be simpler to require the submission of upfront payments at the same time short-form applications are filed, we agree with those commenters that argued that they should not be required to commit the large sums that will likely be involved in broadband PCS upfront payment for longer than is necessary. Accordingly, applicants will not be required to tender upfront payments with their short-form applications. Instead, as noted above, upfront payments will be due by a date specified by Public Notice, but generally no later than 14 days before a scheduled auction. This period should be sufficient to allow the Commission adequate time to process upfront payment data and release a Public Notice listing all qualified bidders, but not so long as to impose undue burdens upon bidders. The rules set forth in Section 1.2106 of the Commission's Rules concerning upfront payments will be applicable in broadband PCS auctions. Each qualified bidder will be issued a bidder identification number and further information and instructions regarding the auction procedures. During an auction, bidders will be required to provide their bidder identification numbers when submitting bids.

C. Payment and Procedures for Licenses Awarded by Competitive Bidding

1. Down Payment

72. The Second Report and Order established a 20 percent down payment by winning bidders to discourage default between the auction and licensing and to ensure payment of the penalty if such default occurs. We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while at the same time not being so onerous as to hinder growth or diminish access. Most of the commenters addressing this issue generally support our proposal that winning bidders increase their deposits with the Commission up to an amount equalling 20 percent of their winning bid or bids. See, e.g., comments of BellSouth at 43-44, PageNet at 35-36, and Telocator at 13. Some commenters feel that a 20 percent down payment requirement would be too high. See comments of Sprint at 18 (prefers a 10 percent down payment).

⁵⁰ For example, in our first broadband PCS auction (the 30 MHz MTA licenses on blocks A and B), the smallest upfront payment that may be submitted to qualify an applicant to bid will be calculated by multiplying the population of the least populous MTA (American Samoa: population 47,000) times 30 times two cents, or \$28,200. It should be noted, however, that this minimal upfront payment will entitle the bidder to bid only on a license to serve American Samoa.

73. We believe that the reasoning that led us to conclude that 20 percent is the appropriate down payment applies to broadband PCS auctions. We therefore will require that, with the exception of bidders eligible for installment payments in the entrepreneurs' blocks (see Section VII, *infra*), winning bidders in broadband PCS auctions supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s).⁵¹ Winning bidders will be required to submit the required down payment by cashier's check or wire transfer to our lock-box bank by a date to be specified by Public Notice, generally within five (5) business days following the close of bidding. All auction winners will generally be required to make full payment of the balance of their winning bids within five (5) business days following award of the license. Grant of the license will be conditioned on this payment.

74. An auction winner that is eligible to make payments through an installment plan (see Section VII, *infra*) will be subject to different payment requirements. Such an entity will be required to bring its deposits with the Commission up to only 5 percent of its winning bid after the bidding closes, and will pay an additional 5 percent of its winning bid to the Commission after a license is granted.

2. Bid Withdrawal and Default Penalties

75. As we discussed in the Second Report and Order, it is critically important to the success of our system of competitive bidding that potential bidders understand that there will be a substantial penalty assessed if they withdraw a high bid, are found not to be qualified to hold licenses or default on payment of a balance due. There was substantial support in the comments for the notion that the Commission is authorized to and should order forfeiture of upfront and down payments if the auction winner later defaults or is disqualified. See, e.g., comments of CTIA at 29-30, AT&T at 35, n.43, PageNet at 35-36, Cook Inlet at 47, and BellSouth at 42-44. We concluded, however, that forfeiture of all amounts that a bidder may have on deposit with the Commission may, in some circumstances, be too severe a penalty and would not necessarily be rationally related to the harm caused by withdrawal, default or disqualification. See Second Report and Order at ¶ 197.

⁵¹ If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default penalties due, amounts to 20 percent or more of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default penalties due, the additional monies will be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the penalty cannot yet be determined, the bidder will be required to make a deposit of 20 percent of the amount bid on such licenses. When it becomes possible to calculate and assess the penalty, any excess deposit will be refunded. Upfront payments will be applied to such deposits and to bid withdrawal and default penalties due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.

76. This logic applies to broadband PCS auctions, so for these auctions we will employ the bid withdrawal, default and disqualification penalties adopted in the Second Report and Order, which are reflected in Sections 1.2104(g) and 1.2109 of the Commission's Rules. Any bidder who withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.⁵² No withdrawal penalty will be assessed if the subsequent winning bid exceeds the withdrawn bid. After bidding closes, a defaulting auction winner (*i.e.*, a winner who fails to remit the required down payment within the prescribed time, fails to pay for a license, or is otherwise disqualified) will be assessed an additional penalty of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. See 47 C.F.R. §§ 1.2104(g) and 1.2109. The additional three percent penalty is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We will hold deposits made by defaulting or disqualified auction winners until full payment of the penalty.⁵³ We believe that these penalties will adequately discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements. As we explained in the Second Report and Order, we further believe that this approach is well within our authority under both Section 309(j)(4)(B) and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), as it is clearly necessary to carry out the rapid deployment of new technologies through the use of auctions.⁵⁴

77. In addition, if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems

⁵² If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay a penalty equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. If a license which is the subject of withdrawal or default is not re-auctioned, but is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, *i.e.*, they may decline without penalty. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore we will not hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

⁵³ In rare cases in which it would be inequitable to retain a down payment, we will entertain requests for waiver of this provision.

⁵⁴ See Second Report and Order at ¶ 198.

necessary, including institution of proceedings to revoke any existing licenses held by the applicant. See Second Report and Order at ¶ 198.

3. Re-Offering Licenses When Auction Winners Default

78. In the event that an auction winner defaults or is otherwise disqualified, the Commission must determine whether to hold a new auction or simply offer the license to the second-highest bidder. Parties commenting on this issue generally favored re-auctioning the license, pointing out that changing market and even technological developments since the initial auction may change the amounts that bidders are willing to pay for a license, especially if the intervening period is relatively long. They urge that any re-auction be open to new bidders, arguing that such a procedure would reduce the incentive of losing bidders to file unmeritorious petitions to deny against the auction winner. See, e.g., comments of BellSouth at 37, Utilities Telecommunications Council at 21.

79. As we stated in the Second Report and Order, we believe that, as a general rule, when an auction winner defaults or is otherwise disqualified after having made the required down payment, the best course of action is to re-auction the license. See Second Report and Order at ¶ 204. Although we recognize that this may cause a brief delay in the initiation of service to the public, during the time between the original auction and the disqualification circumstances may have changed so significantly as to alter the value of the license to auction participants as well as to parties who did not participate. In this situation, awarding licenses to the parties that value them most highly can best be assured through a re-auction. However, if the default occurs within five (5) business days after the bidding has closed, the Commission retains the discretion to offer the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at the final bid levels.⁵⁵

80. If a new auction becomes necessary because of default or disqualification more than five (5) business days after bidding has ended, the Commission will afford new parties an opportunity to file applications. One of our primary goals in conducting auctions is to assure that all serious interested bidders are in the pool of qualified bidders at any re-auction. We believe that allowing new applications will promote achievement of this goal, which outweighs the short delay that we recognize may result from allowing new applications in a re-auction. Indeed, if we were not to allow new applicants in a re-auction, interested parties might be forced into an after-market transaction to obtain the license, which would itself delay service to the public and may prevent the public from recovering a reasonable portion of the value of the spectrum resource.

⁵⁵ If only a small number of relatively low-value licenses are to be re-auctioned and only a short time has passed since the initial auction, the Commission may choose to offer the license to the highest losing bidders because the cost of running another auction may exceed the benefits.

4. Long-Form Application

81. If the winning bidder makes the down payment in a timely manner, a long-form application filed on FCC Form 401 (as modified), or such other form as may be adopted for Commercial Mobile Radio Service use in GEN Docket No. 93-252, will be required to be filed by a date specified by Public Notice, generally within ten (10) business days after the close of bidding.⁵⁶ After the Commission receives the winning bidder's down payment and the long-form application, we will review the long-form application to determine if it is acceptable for filing. In addition to the information required in the long-form application of all winning bidders, each winning bidder on licenses in frequency blocks C and F will be required to submit evidence of its eligibility to bid on licenses in these blocks, as well as evidence to support its claim to any special provisions made available to designated entities. This information may be included in an exhibit to FCC Form 401, and must include the gross revenues and total assets of the applicant and all attributable investors in the applicant, and a certification that the personal net worth of each individual investor does not exceed the eligibility limitation. This information will enable the Commission, and other interested parties, to ensure the validity of the applicant's certification of eligibility to bid in blocks C and F (submitted as part of its FCC Form 175) and its eligibility for any bidding credits, installment payment options, or other special provision. Upon acceptance for filing of the long-form application, the Commission will issue a Public Notice announcing this fact, triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner.

5. Processing and Procedural Rules

82. In the Notice, we proposed to adopt general processing and procedural rules for broadband PCS based on Part 22 of the Commission's Rules. One commenter, AIDE, argues that the Commission's reference to proposed PCS rules is vague and legally insufficient for a Notice of Proposed Rule Making. Comments of AIDE at 16-17. AIDE also asserts that the adoption of PCS processing and procedural rules is beyond the scope of the Notice in this rule

⁵⁶ Schedule B to FCC Form 401 will not be required to be submitted by broadband PCS applicants. However, applicants for broadband PCS licenses proposing to use any portion of broadband PCS spectrum to offer service on a private mobile radio service basis must overcome the presumption that PCS is a commercial mobile radio service. Regulatory Treatment of Mobile Services, Second Report and Order in GEN Docket No. 93-252, 9 FCC Rcd 1411, 1460-63 (1994); 47 C.F.R. § 20.9(a)(11), (b). Applicants (or licensees) seeking to dedicate a portion of the spectrum for private mobile radio service will be required to attach as an exhibit to the Form 401 application a certification that it will offer PCS service on a private mobile radio basis. The certification must include a description of the proposed service sufficient to demonstrate that it is not within the definition of commercial mobile radio service in Section 20.3 of the Commission's Rules. Id.

making proceeding. Id. We disagree. The Notice sought comment on specific rule sections contained in Part 22 of our Rules and asked commenters to indicate what modifications should be made to those rules to adapt them for PCS services. See Notice at ¶ 128. In addition, the Notice specifically requested comment on the general procedural, processing and petition to deny procedures that should be used for auctionable services. The Notice's proposal to adopt processing rules based on Part 22 of the Commission's Rules, with any appropriate modifications for PCS services, clearly indicated to commenters the terms of the proposed rules, as is required by 5 U.S.C. § 553 and 47 C.F.R. § 1.413(c). Accordingly, we believe that the Notice's description of the proposed rules was sufficiently specific to alert interested parties to the substance of our proposal and to provide an adequate opportunity for comment on those proposals. Moreover, we conclude that these issues are well within the scope of the Notice.

83. As we proposed, we adopt for broadband PCS a modified version of the application processing rules contained in Part 22 of the Commission's Rules. These rules, which will comprise Subpart I of Part 24 of our Rules, will govern application filing and content requirements, waiver procedures, procedures for return of defective applications, regulations regarding modification of applications, and general application processing rules. We also adopt petition to deny procedures based on Section 22.30 of the Commission's Rules. In addition, as we proposed in the Notice, we adopt rules similar to Sections 22.927, 22.928 and 22.929 of our existing rules (47 C.F.R. §§ 22.927, 22.928, 22.929) to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from sincere broadband PCS applicants. In this regard, we limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner. These rules are included in Appendix B.

84. With regard to petitions to deny, we adopt expedited procedures consistent with the provisions of Section 309(i)(2) of the Communications Act to resolve substantial and material issues of fact concerning qualifications.⁵⁷ This provision requires us to entertain petitions to deny the application of the auction winner if petitions to deny are otherwise provided for under the Communications Act or our Rules.

85. As we indicated in the Second Report and Order, the Commission need not conduct a hearing before denying an application if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination. See Second Report and Order at ¶ 202. In the event that the Commission identifies substantial and material issues of fact in need of resolution, Section 309(i)(2) of the Communications Act permits in any hearing the submission of all or part of evidence in written form and allows

⁵⁷ The adoption of such procedures is necessary because Section 309(j)(5) of the Communications Act forbids the granting of licenses through competitive bidding unless the Commission determines that the applicant is qualified.

employees other than administrative law judges to preside over the taking of written evidence. We will incorporate these principles into our broadband PCS procedural rules.

D. Procedures in Alternative Auction Design

86. If we decide to employ a sequential auction design (using either oral or electronic bid submission), the same general rules and procedures described above will be used with certain modifications to fit the oral or electronic auction format. In the case of oral auctions, bidders would be required to follow the procedures described above, including the submission of the standard upfront payment of \$0.02 per MHz-pop prior to the auction. Applicants would submit a sufficient upfront payment to cover the total number of MHz-pops they desire to win. Once a bidder has won the maximum number of MHz-pops covered by its upfront payment, that bidder will be precluded from further bidding in the auction.⁵⁸ Immediately after bidding closes on a license, the winning bidder (*i.e.*, the high bidder on a license on which bidding has closed) will be asked to sign a bid confirmation form. No other license will be put up for bid until a bid confirmation form is signed by a high bidder on the previous license.⁵⁹ Because we recognize that in an oral auction the chances of a bidder accidentally placing a high bid are greater than in other auction methods, and because the harm will be limited if the license is immediately re-offered, we will not impose a penalty on a high bidder who withdraws a high bid by refusing to sign the bid confirmation form. Thus, in an sequential oral auction in which a high bidder declines to sign the bid confirmation form, the license will be immediately put up for bid again. If, however, a high bidder signs a bid confirmation form but subsequently fails to submit the 20 percent down payment or otherwise defaults, the standard default penalties (described *supra*) will apply.⁶⁰

87. If we decide to use sequential electronic bidding, bidders would again follow the general procedures described above including the submission of the standard upfront payment amount of \$0.02 per MHz per pop prior to the auction. Applicants would submit a sufficient upfront payment to cover the total number of MHz-pops they desire to win. An applicant will not be eligible to bid on a license for which it has not applied or which contains more MHz-pops than the total MHz-pops covered by the bidder's upfront payment less any MHz-pops already won by that bidder. Once a bidder has won licenses representing the maximum number of MHz-pops reflected in its upfront payment, that bidder will be precluded from further bidding in the auction. Each bidder's eligibility will be computed and tracked by

⁵⁸ This is similar to the procedure adopted in the Fourth Report and Order for the oral auctioning of IVDS licenses. *See* Fourth Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2330 (released May 10, 1994).

⁵⁹ If we use single combined bidding, described *supra*, no other licenses will be put up for bid until a bid confirmation form is signed for each license put up for bid together in a combined auction.

⁶⁰ *See* 47 C.F.R. §§ 1.2104 and 1.2109.

the auction software and bids placed by ineligible bidders will not be accepted. After the auctioneer declares bidding on a license closed and the high bidder has been notified, that bidder will be asked to confirm its high bid. If the high bidder in a sequential electronic auction declines to confirm its high bid, the license will be immediately re-auctioned and no penalty will be imposed. No other licenses will be put up for bid until a bid confirmation form is signed by a high bidder on the previous license.⁶¹ As with sequential oral auctions, if a high bidder signs a bid confirmation form but subsequently fails to submit the 20 percent down payment or otherwise defaults, the standard default penalties (described supra) will apply.

VI. REGULATORY SAFEGUARDS

A. Transfer Disclosure Requirements

88. In Section 309(j), Congress directed the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." 47 U.S.C. § 309(j)(4)(E). In the Second Report and Order, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied. See Second Report and Order at ¶¶ 210-226 and 258-265.

89. In the Second Report and Order (at ¶ 214), we stated our belief that it is important to monitor transfers of licenses awarded by competitive bidding in order to accumulate the data necessary to evaluate our auction designs and to judge whether "licenses [have been] issued for bids that fall short of the true market value of the license." H.R. Rep. No. 103-111 at 257. Therefore, we imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by a designated entity or not. See 47 C.F.R. § 1.2111(a). We believe that the transfer disclosure requirements contained in Section 1.2111(a) of the Commission's Rules should apply to all broadband PCS licenses obtained through the competitive bidding process. Generally, licensees transferring their licenses within three years after the initial license grant will be required to file, together with their transfer applications, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license. As we indicated in the Second Report and Order, we will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, in order to determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context. See Second Report and Order at

⁶¹ See also n. 59, supra.

B. Performance Requirements

90. The Budget Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."⁶³ In the Second Report and Order we decided that it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services. The broadband PCS service rules already contain specific performance requirements, such as the requirement to construct within a specified period of time. See, e.g., 47 C.F.R. § 24.203. Failure to satisfy these construction requirements will result in forfeiture of the license. Accordingly, we do not see the need to adopt any additional performance requirements in this Report and Order.

C. Rules Prohibiting Collusion

91. In the Second Report and Order, we adopted a special rule prohibiting collusive conduct in the context of competitive bidding. See 47 C.F.R. § 1.2105(c). We referred to the Notice, wherein we indicated our belief that such a rule would serve the objectives of the Budget Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders. See Second Report and Order at ¶ 221. We believe that this rule is nowhere more necessary than with respect to broadband PCS auctions, where we expect bidder interest to be high and the incentives to collude to be great. Thus, Section 1.2105(c) will apply to broadband PCS auctions. This rule provides that from the time the short-form applications are filed until the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application. In addition, as discussed in Section IV, supra, bidders will be required by Section 1.2105(a)(2) of the Commission's Rules to identify on their Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Bidders will also be required to certify that they have not entered and will not enter

⁶² We note that these transfer disclosure provisions are in addition to the limitations on transfers that we have adopted in the Broadband PCS Reconsideration Order (with respect to spectrum disaggregation) or elsewhere in this Order (with respect to transfers of licenses in the entrepreneurs' blocks).

⁶³ See Section 309(j)(4)(B) of the Communications Act, as amended.

into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid.

92. Winning bidders in broadband PCS auctions will also be subject to Section 1.2107 of the Commission's Rules, which among other things requires each winning bidder to attach as an exhibit to the Form 401 long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortium, joint venture, partnership, or other agreement or arrangement they had entered into relating to the competitive bidding process prior to the close of bidding. All such arrangements must have been entered into prior to the filing of short-form applications. In addition, where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount and revocation of their license(s), and they may be prohibited from participating in future auctions.

VII. TREATMENT OF DESIGNATED ENTITIES

A. Overview and Objectives

93. Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). To achieve this goal, the statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures." Thus, while providing that we charge for licenses, Congress has ordered that the Commission design its auction procedures to ensure that designated entities have opportunities to obtain licenses and provide service. For that purpose, the law does not mandate the use of any particular procedure, but it specifically approves the use of "tax certificates, bidding preferences, and other procedures." The use of any such procedure is, in our view, mandated where necessary to achieve Congress's objective of ensuring that designated entities have the opportunity to participate in broadband PCS.

94. In addition to this mandate, the statute sets forth various congressional objectives. For example, it provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B); see also id. §309(j)(4)(C) (requiring the Commission when prescribing area designations and bandwidth

assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women).⁶⁴ Further, Section 309(j)(4)(A) provides that to promote the statute's objectives the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."

95. To satisfy these statutory mandates and objectives, we established in the Second Report and Order eligibility criteria and general rules that would govern the special measures for small businesses, rural telephone companies, and businesses owned by members of minority groups and women. We also identified several measures, including installment payments, spectrum set-asides, bidding credits and tax certificates, that we could choose from in establishing rules for auctionable spectrum-based services. We stated that we would decide whether and how to use these special provisions, or others, when we developed specific competitive bidding rules for particular services. In addition, we set forth rules designed to prevent unjust enrichment by designated entities who transfer ownership in licenses obtained through the use of these special measures or who otherwise lose their designated entity status.

96. We intend in the new broadband personal communications service to meet fully the statutory mandate of Section 309(j)(4)(D), as well as the objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. As explained more fully in this Order, in some respects it is necessary to do more to ensure that businesses owned by members of minority groups and women have a meaningful opportunity to participate in the provision of personal communications services than is necessary to ensure participation by other designated entities. In particular, we have concluded that steps such as adoption of bidding credits, tax certificates, alternate payment plans and relaxed attribution rules, must be taken to encourage investment in minority and women-owned businesses. These special provisions are tailored to address the major problem facing minorities and women desiring to offer PCS -- lack of access to capital. Moreover, because broadband PCS licenses in many cases are expected to be auctioned for large sums of money in the competitive bidding process, and because build-out costs are likely to be high, it is necessary to do more to ensure that designated entities have the opportunity to participate in broadband PCS than is necessary in other, less costly

⁶⁴ As noted in the Second Report and Order, the statute also requires the Commission to promote the purposes specified in Section 1 of the Communications Act, which include, among other things, "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151; Second Report and Order at n. 3.

spectrum-based services. In our view, these steps and the others we adopt are required to fulfill Congress's mandate that designated entities have the opportunity to participate in the provision of PCS. The measures we adopt today will also increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of broadband PCS service.

97. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the difficulties these groups encounter in accessing capital. Indeed, less than two years ago, Congress made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."⁶⁵ Because of these problems, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."⁶⁶

98. Congress also recognized that these funding problems are even more severe for minority and women-owned businesses, who face discrimination in the private lending market. For example, Congress explicitly found that businesses owned by minorities and women have particular difficulties in obtaining capital and that problems encountered by minorities in this regard are "extraordinary."⁶⁷ A number of studies also amply support the existence of widespread discrimination against minorities in lending practices. In October, 1992, the year prior to passage of the auction law, the Federal Reserve Bank of Boston released an important and highly-publicized study demonstrating that a black or Hispanic applicant in the Boston area is roughly 60 percent more likely to be denied a mortgage loan than a similarly situated white applicant.⁶⁸ The researchers measured every variable mentioned as important in numerous conversations with lenders, underwriters, and examiners and found that minority applicants are more likely to be denied mortgages even where they have the same obligation ratios, credit history, loan to value and property characteristics as white applicants. The lending discrimination that occurs, the study found, does not involve the application of specific rules, but instead occurs where discretionary decisions are made. Based on the Boston study, it is reasonable to expect that race would affect business loans that are based on more subjective criteria to an even greater extent than the mortgage loan process, which

⁶⁵ Small Business Credit and Business Opportunity Enhancement Act of 1992, Section 331(a) (3), Pub. Law 102-366, Sept. 4, 1992.

⁶⁶ *Id.*, Section 331(b)(2),(3).

⁶⁷ *Id.*, Section 112(4); 331(a)(4).

⁶⁸ Mortgage Lending in Boston: Interpreting HMDA Data, Federal Reserve Bank of Boston, Working Paper 92-7 (October 1992).

uses more standard rules.

99. Importantly, the Boston study also found that, because most loan applicants have some negative attributes, most loan denials will appear legitimate by some objective standard. Accordingly, the study stated, the lending discrimination that occurs is very difficult to document at the institution level, so legal remedies may be largely ineffective. Indeed, Congress had already attempted to address discriminatory lending practices through laws that bar discrimination in lending, such as the Equal Credit Opportunity Act, enacted in 1974 and amended many times since then. Congress, therefore, could reasonably assume, based on the Boston study, and its legislative experience regarding discriminatory lending practices, that minority applicants for licenses issued in spectrum auctions would face substantial (albeit subtle) barriers to obtaining financing. Any legal remedies, even if effective, would, moreover, come too late to ensure that minorities are able to participate in spectrum auctions and obtain licenses.

100. Similar evidence presented in testimony before the House Minority Enterprise Subcommittee on May 20, 1994 indicates that African American business borrowers have difficulty raising capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and they are less likely to have alternate loan sources, such as affluent family or friends. Assuming two hypothetical college educated, similarly-situated male entrepreneurs, one black, one white, the testimony indicated that the white candidate would have access to \$1.85 in bank loans for each dollar of owner equity invested, while the black candidate would have access to only \$1.16. According to the testimony, the problems associated with lower incomes and intergenerational wealth, as well as the discriminatory treatment minorities receive from financial institutions, make it much more likely that minorities will be shut out of capital intensive industries, such as telecommunications. This testimony also noted that African American representation in communications is so low that it was not possible to generate meaningful summary statistics on underrepresentation.⁶⁹

101. The inability to access capital is also a major impediment to the successful participation of women in broadband PCS auctions. In enacting the Women's Business Ownership Act in 1988, Congress made findings that women, as a group, are subject to discrimination that adversely affects their ability to raise or secure capital.⁷⁰ As AWRT

⁶⁹ Testimony of Dr. Timothy Bates, Visiting Fellow, The Woodrow Wilson Center, before the U.S. House of Representatives Committee on Small Business, Subcommittee on Minority Enterprise, Finance, and Urban Development (House Minority Enterprise Subcommittee), May 20, 1994.

⁷⁰ Pub. L. 100-533 (1988). In 1991, Congress enacted the Women's Business Development Act of 1991 to further assist the development of small businesses owned by women. See Pub. L. 102-191 (1991).

documents, these discriminatory barriers still exist today. Indeed, AWRT reports that while venture capital is an important source of funding for telecommunications companies, women-owned companies received only approximately one percent of the \$3 billion invested by institutional venture capitalists in 1993. Citing a 1992 National Women's Business Council report, AWRT further argues that even successful women-owned companies did not overcome these financing obstacles after they had reached a level of funding and profitability adequate for most other businesses.⁷¹

102. A study prepared in 1993 by the National Foundation for Women Business Owners (NFWBO) further illustrates the barriers faced by women-owned businesses. For example, it finds that women-owned firms are 22 percent more likely to report problems dealing with their banks than are businesses at large. In addition, the NFWBO study finds that the largest single type of short-term financing used by women business owners is credit cards and that over half of women-owned firms use credit cards for such purposes, as compared to 18 percent of all small to medium-sized businesses, which generally use bank loans and vendor credit for short-term credit needs. With regard to long-term financing, the study states that a greater proportion of women-owned firms are turning, or are forced to turn, to private sources, and to a wider variety of sources, to fulfill their needs. Based on these findings, the NFWBO study concludes that removal of financial barriers would encourage stronger growth among women-owned businesses, resulting in much greater growth throughout the economy.⁷²

103. If we are to meet the congressional goals of promoting economic opportunity and competition by disseminating licenses among a wide variety of providers, we must find ways to counteract these barriers to entry. Over the years, both Congress and the Commission have tried various methods to enhance access to the broadcast and cable industries by minorities and women. For example, in the late 1960s, the FCC began to promote nondiscriminatory employment policies by broadcast licensees. These equal employment opportunity efforts have taken the form of Commission rules and policies that require licensees not to discriminate, to report hiring and promotion statistics, and to implement affirmative action programs.⁷³ The Commission also has adopted similar equal employment rules for licensees in the common carrier, public mobile, and international fixed public radio

⁷¹ See Letter of AWRT to the Honorable Kweisi Mfume, Chairman, House Minority Enterprise Subcommittee, June 1, 1994.

⁷² See The National Foundation for Women Business Owners, *Financing the Business, A Report on Financial Issues from the 1992 Biennial Membership Survey of Women Business Owners*, October 1993.

⁷³ 47 C.F.R. § 73.2080 (broadcasters must "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of the station's employment policy and practice").

communication services,⁷⁴ as well for cable operators.⁷⁵ The cable EEO rules were recently revised as part of the implementation of the Cable Act of 1992, and they now apply to cable entities, satellite master antenna television operators serving 50 or more subscribers and any multichannel video programming distributor.⁷⁶

104. A decade after it first addressed discriminatory hiring practices, the Commission began to look into the serious underrepresentation of minorities among owners of broadcast stations. Recognizing that it could play an important role in alleviating this problem through the licensing process, the Commission adopted its tax certificate and distress sale policies in 1978 to encourage minority ownership of broadcast facilities.⁷⁷ It noted that full minority participation in the ownership and management of broadcast facilities would result in a more diverse selection of programming and would inevitably enhance the diversity of control of a valuable resource, the electromagnetic spectrum.⁷⁸

105. In implementing these ownership policies, the Commission identified lack of access to capital as one of the principal barriers to minority entry. Thus, in 1981, the Commission created the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (the "Rivera Committee") to investigate financing methods and to give recommendations to the FCC on ways to encourage minority ownership of telecommunications facilities.⁷⁹ The Rivera Committee confirmed that the shortage of

⁷⁴ 47 C.F.R. §§ 21.307, 22.307, 23.55.

⁷⁵ 47 C.F.R. §§ 76.71-76.79.

⁷⁶ See 47 U.S.C. § 554. In addition, the Commission has proposed adopting EEO requirements for all CMRS licensees, including PCS licensees. Regulatory Treatment of Mobile Services, Further Notice of Proposed Rule Making, GN Docket 93-252, FCC 94-100 (released May 20, 1994).

⁷⁷ See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982) (1982 Policy Statement); see also Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978) (1978 Policy Statement).

⁷⁸ Because of the role of cable television systems in retransmitting broadcast signals, the Commission has also issued tax certificates in connection with sales of cable systems. See Statement of Policy on Minority Ownership of CATV Systems, FCC 82-524, released December 22, 1982.

⁷⁹ Strategies for Advancing Minority Ownership Opportunities in Telecommunications, The Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications to the Federal Communications Commission, May 1982 (Rivera Committee Report).

capital is a principal problem facing minorities seeking ownership opportunities and further found that this shortage was due to minority inexperience in obtaining financing, financial institution misconceptions about potential minority borrowers, and marketplace structural problems, such as high interest rates and low broadcast industry earnings growth. Among other things, the Rivera Committee suggested educational and outreach programs and expanding the tax certificate program to nonbroadcast properties such as common carrier and land mobile. In response to this recommendation, the FCC submitted draft legislation to Congress proposing to broaden the scope of the Commission's authority to issue tax certificates in connection with the sale or exchange of any type of telecommunications facilities.⁸⁰ On March 24, 1983, The Minority Telecommunications Ownership Tax Act of 1983, H.R. 2331, which incorporated the Commission's proposals, was introduced in the House of Representatives.⁸¹

106. Congress also took steps to address the problem of minority underrepresentation in communications. In 1982, it mandated the grant of a "significant preference" to minority applicants participating in lotteries for spectrum-based services. 47 U.S.C. § 309(i)(3)(A). And, in 1988 and each fiscal year thereafter, Congress attached a provision to the FCC appropriations legislation, which precluded the Commission from spending any appropriated funds to examine or change its minority broadcast preference policies.⁸²

107. These efforts have met with limited success. The record shows that women and minorities have not gained substantial ownership representation in either the broadcast or non-broadcast telecommunications industries. For example, a 1993 report conducted by the National Telecommunications and Information Administration's (NTIA) Minority Telecommunications Development Program shows that, as of August 1993, only 2.7 percent of commercial broadcast stations were owned by minorities. Another study commissioned by the Commerce Department's Minority Business Development Agency in 1991 found that only one half of one percent of the telecommunications firms in the country were minority owned. The study also identified only 15 minority cable operators and 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging or messaging services in the

⁸⁰ See Federal Communications Draft Legislation Revising Section 1071 of the Internal Revenue Code of 1954 (January 17, 1983).

⁸¹ The Minority Telecommunications Ownership Tax Act of 1983, H.R. 2331, 98th Congress, 1st Sess., March 24, 1983.

⁸² See Continuing Appropriations Act for Fiscal Year 1988, Pub. L. 100-102, 101 Stat. 1329-31; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1994, Pub. L. 103-121, 107 Stat. 1167.

United States.⁸³ And, according to the last available U.S. Census, only 24 percent of the communications firms in the country were owned by women, and these women-owned firms generated only approximately 8.7 percent of the revenues earned by communications companies.⁸⁴ When companies without paid employees are removed from the equation, firms with women owners represent only 14.5 percent of the communications companies in the country.⁸⁵ One result of these low numbers is that there are very few minority or women-owned businesses that bring experience or infrastructure to PCS. They thus face an additional barrier relative to many existing service providers.

108. Small businesses also have not become major participants in the telecommunications industry. For instance, one commenter asserts that ten large companies -- six Regional Bell Operating Companies (RBOCs), AirTouch (formerly owned by Pacific Telesis), McCaw, GTE and Sprint -- control nearly 86 percent of the cellular industry. This commenter further contends that nine of these ten companies control 95 percent of the cellular licenses and population in the 50 BTAs that have one million or more people.⁸⁶

109. Congress directed the Commission to ensure that, together with other designated entities, rural telephone companies have the opportunity to participate in the provision of PCS. Rural areas, because of their more dispersed populations, tend to be less profitable to serve than more densely populated urban areas. Therefore, service to these areas may not be a priority for many PCS licensees. Rural telephone companies, however, are well positioned because of their existing infrastructure to serve these areas profitably. We, therefore, have adopted special provisions to encourage their participation, increasing the likelihood of rapid introduction of service to rural areas.

110. In the new auction law, Congress directed the Commission to remedy this

⁸³ See Testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, before the House Minority Enterprise Subcommittee, May 20, 1994. In his testimony at this same hearing, FCC Chairman Reed Hundt cited some of these statistics and noted that in light of this serious underrepresentation, there remains "a fundamental obligation for both Congress and the FCC to examine new and creative ways to ensure minority opportunity." Testimony of Reed E. Hundt, Chairman, Federal Communications Commission, before the House Minority Enterprise Subcommittee, May 20, 1994.

⁸⁴ See Women-Owned Businesses, 1987 Economic Censuses, U.S. Department of Commerce, issued August 1990, at 7, 147. The census data includes partnerships, and subchapter S corporations. We have no statistics regarding women representation among owners of larger communications companies.

⁸⁵ Id.

⁸⁶ Ex parte filing of DCR Communications, May 31, 1994.

serious imbalance in the participation by certain groups, especially minorities and women. The record indicates that, in the absence of meaningful efforts to assist designated entities, there would be good reason to think that participation by these groups, particularly businesses owned by women and minorities, would continue to be severely limited. Indeed, the auction law itself envisions a process that requires payment of funds to acquire an initial license, unlike existing licensing methods such as comparative hearings or lotteries. It is therefore possible that participation by those with limited access to capital could be further diminished by operation of the statute, absent affirmative provisions to create competitive opportunity for designated entities. The measures we adopt in this Fifth Report and Order thus will carry out Congress's directive to provide meaningful opportunities for small entities, rural telephone companies, and businesses owned by women and minorities to provide broadband PCS services. The rules also are expressly designed to address the funding problems that face these groups and that are their principal barriers to entry.

111. We also intend that designated entities who win licenses have the opportunity to become strong competitors in this service. While the new broadband PCS service presents tremendous opportunities for designated entities to participate in the provision of the next generation of innovative wireless mobile telecommunications services, it is expected to be a highly competitive service, and the estimated costs of acquiring a license and constructing facilities are substantial. In the Broadband PCS Reconsideration Order, which was adopted June 9, 1994, we took specific steps to assist designated entities to become viable competitors in the provision of broadband PCS. For example, we modified the PCS spectrum allocation plan by shifting all channels blocks to a contiguous lower segment of the "emerging technologies band" in part to bolster the ability of designated entities to obtain more competitively viable licenses. In addition, we relaxed some of the ownership and attribution rules with respect to cellular operators' participation in PCS to foster investment in designated entity ventures,⁸⁷ and we also relaxed the PCS/cellular cross-ownership rule for designated entities with cellular holdings to allow them to further expand their opportunities in broadband PCS.⁸⁸ Further, we took steps that will result in lower capital costs for designated entities that obtain PCS licenses, including adoption of a band plan that will reduce the costs of clearing the PCS spectrum of incumbent microwave users as well as relaxing the construction requirements.

112. The measures we establish today to encourage the entry of designated entities also are designed to promote strong, long-term bona fide competitors. For example, we have revised the definition of a small business set forth in the Second Report and Order to include entities with up to \$40 million in gross revenues, and we will allow these small businesses to pool their resources and form consortia to bid in the entrepreneurs' blocks. We also adopt rules that allow entrepreneurial businesses, small businesses, and businesses owned by women

⁸⁷ Broadband PCS Reconsideration Order at ¶127.

⁸⁸ Id. at ¶125.

and minorities to raise capital by attracting passive equity investors. At the same time, we have designed these rules to ensure that the special provisions adopted for such businesses accrue to the intended beneficiaries.

B. Summary of Special Provisions for Designated Entities

113. As discussed more fully below, many commenters in this proceeding believe that the inability of designated entities to obtain adequate funding has a profoundly adverse effect on the potential for these businesses to bid successfully in auctions against very large, established businesses. Therefore, we take a number of steps in this Order to help address this imbalance.

- We establish two "entrepreneurs' blocks" (frequency blocks C and F) in which large companies (those with \$125 million or more in annual gross revenues or \$500 million or more in total assets) will be prohibited from bidding.
- Bidding credits will be granted both to small businesses and to businesses owned by women and minorities in the entrepreneurs' blocks to provide them with a better opportunity to compete successfully in broadband PCS auctions.
- Certain winning bidders in frequency blocks C and F will be permitted to pay the license price in installments, and the interest rate and moratorium on principal payments will be adjusted to assist small businesses and women and minority-owned businesses.
- We adopt a tax certificate program for minority and women-owned businesses, which will provide additional assistance in their efforts to attract equity investors.
- Rural telephone companies will be allowed to obtain broadband PCS licenses that are geographically partitioned from larger PCS service areas to provide them more flexibility to serve rural subscribers.⁸⁹
- Bidders in the entrepreneurs' blocks will be required to pay an upfront payment of only \$0.015 per MHz per pop, in contrast to the \$0.02 per MHz per pop required in the other blocks.

⁸⁹ In a Further Notice of Proposed Rule Making in this docket, we will seek comment on whether a partitioning option for small businesses or businesses owned by women or minorities, as suggested by some of the commenters, may be appropriate. In that Further Notice, we also will seek comment on whether the Commission should impose a restriction on the assignment or transfer of control of partitioned licenses by rural telephone companies or other designated entities for some period of time.

114. The following chart highlights the major provisions adopted for businesses bidding in the entrepreneurs' blocks.⁹⁰

	<u>Bidding Credits</u>	<u>Installment Payments</u>	<u>Tax Certificates for Investors</u>
Entrepreneurial Businesses (\$40 MM - \$125 MM in revenue and less than \$500 MM in total assets)	0	Interest only for 1 year; rate equal to 10-year Treasury note plus 2.5%; (for businesses with revenues greater than \$75 MM, available only in top 50 markets)	No
Small Businesses (less than \$40 MM revenues)	10%	Interest only for 2 years; rate equal to 10-year Treasury note plus 2.5%;	No
Businesses Owned by Minorities and/or Women (\$40 MM - \$125 MM in revenues)	15%	Interest only for 3 years; rate equal to 10-year Treasury note;	Yes
Small Businesses Owned by Minorities and/or Women (less than \$40 MM revenues)	25%	Interest only for 5 years; rate equal to 10-year treasury note;	Yes

C. Summary of Eligibility Requirements and Definitions

1. Entrepreneurs' Blocks and Small Business Eligibility

115. The following points summarize the principal rules regarding eligibility to bid in the entrepreneurs' blocks and to qualify as a small business. In addition, they summarize the attribution rules we will use to assess whether an applicant satisfies the various financial thresholds. More precise details are discussed in the subsections that follow.

⁹⁰ This table is not comprehensive and therefore it does not present all the provisions established for designated entities, especially those available outside the entrepreneurs' blocks.

Financial Caps:

- Entrepreneurs' Blocks: To bid in the entrepreneurs' blocks, the applicant, including attributable investors and affiliates, must cumulatively have less than \$125 million in gross revenues and less than \$500 million in total assets. No individual attributable investor or affiliate may have \$100 million or more in personal net worth.
- Small Business: To qualify for special measures accorded a small business, the applicant, including attributable investors and affiliates, must cumulatively have less than \$40 million in gross revenues. No individual attributable investor or affiliate may have \$40 million or more in personal net worth.

Attribution Rules:

- Control Group. The gross revenues, total assets and personal net worth of certain investors are not considered so long as the applicant has a "control group" consisting of one or more individuals or entities that control the applicant, hold at least 25 percent of the equity and, for corporations, at least 50.1 percent of the voting stock.
- The gross revenues, total assets and personal net worth of each member of the control group are counted toward the financial caps.
- Other Investors. Where the applicant has a control group, the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds 25 percent or more of the applicant's passive equity (which, for corporations, includes as much as 5 percent of the voting stock).
 - Passive Equity. Passive equity is limited partnership or non-voting stock interests or voting stock interests of 5 percent or less of the issued and outstanding voting stock.
- Option for Minority or Woman-Owned Applicants. If the control group (consisting entirely of women and/or minorities) owns at least 50.1 percent of the equity and, for corporations, at least 50.1 percent of the voting stock, then the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds more than 49.9 percent of the applicant's passive equity (which, for corporations, includes as much as 5 percent of the voting stock).
- Affiliates. The gross revenues, assets and personal net worth of outside interests held by the applicant (and the attributable investors in the applicant) are counted toward the financial caps if the applicant (or the attributable investors in the applicant) control or have power to control the outside interests or if the applicant (or the attributable investors in the applicant) is under the control of the outside interests. The financial interests of spouses are also attributed to each other.

2. Definition of Women and/or Minority-Owned Business

116. The points below summarize the two structural options available to firms that wish to qualify for the special provisions adopted for businesses owned by minorities and women. These options will be discussed in more detail in the text that follows.

50.1% Equity Option:

- If women and/or minority principals control the applicant and own at least:
 - 50.1 percent of the equity
 - and 50.1 percent of the voting stock, in the case of corporations
- Then any other investor may hold:
 - not more than 49.9 percent of the passive equity (which, for corporations, includes as much as 5 percent of the voting stock).

25% Equity Option:

- If women and/or minority principals control the applicant and own at least:
 - 25 percent of the equity
 - and 50.1 percent of the voting stock, in the case of corporations
- Then any other investor may hold:
 - less than 25 percent of the passive equity (for corporations, any other investor also may hold not more than 5 percent of the voting stock).

117. We also have imposed numerous strict requirements to deter shams and fronts and to prevent abuse of the incentives for designated entities. The Commission intends to enforce vigorously each of these requirements. All licensees in the entrepreneurs' blocks are prohibited from voluntarily assigning or transferring their licenses for three years after grant of the application and for the next two years may assign or transfer licenses only to other entities that satisfy the financial criteria to bid in the entrepreneurs' blocks. Furthermore, a business that seeks to acquire a license from an entity paying in installments during the license period will be required, as a condition of the grant, to pay according to the installment payment terms for which it qualifies, unless they are more favorable in which case the existing terms apply. If the purchaser is not qualified for any installment payment plan, we will require payment of the unpaid balance in full before the sale will be approved. We also adopt rules to ensure that the value of the bidding credit is returned to the government in the event of a transfer of control or assignment of the license to an entity not qualifying for bidding credits or not qualifying for as high a bidding credit as the seller. In addition, we

impose a one-year holding period on licenses received through the benefit of a tax certificate. We will also conduct random audits to ensure that designated entities retain de facto and de jure control. These steps and our eligibility and affiliation rules will help to ensure that the measures we adopt are utilized only by bona fide eligible entities and to deter winning bidders seeking only to make a quick profit on the sale of PCS licenses. Ultimately, we believe that we will best fulfill our statutory mandate by creating powerful incentives for bona fide designated entities to attract the capital necessary to compete both in auctions for broadband PCS and in the provision of service, and by requiring a strict holding period to ensure that the public receives the benefit of this diverse ownership.

D. The Entrepreneurs' Blocks

118. As discussed above, because the auction process itself requires additional expenditures of capital to acquire licenses, this new licensing procedure in many respects holds the potential to erect an additional barrier to entry that had not existed even under the Act's previous licensing methods, comparative hearings and lotteries. As reflected in the House Committee Report, Congress was well aware of that possibility and wanted to ensure that competitive bidding should not exclude smaller entities from obtaining licenses.⁹¹ The inability of small businesses and businesses owned by women and minorities to obtain adequate private financing creates a serious imbalance between these companies and large businesses in their prospects for competing successfully in broadband PCS auctions.

119. In addition, commenters contend that, at the outset, a small PCS business and a large local exchange carrier would value a license very differently. DCR Communications, for example, argues that a local telephone company would have much lower costs of construction and operation through equipment volume discounts, existing billing, accounting, order entry and processing, and customer service systems. Furthermore, DCR contends, the telephone company might decide to use its PCS system simply as an adjunct to a cellular system it owns in a nearby market and market wireless handsets that operate in both frequencies. DCR concludes that the telephone company could justify paying the higher value for the license because it has more ready access to capital.⁹²

120. This concern is echoed by a number of commenters. NTIA agrees that capital formation is a major barrier to full participation by small and minority-owned firms, asserting that capital-constrained firms are likely to assign lower values to PCS licenses than other bidders and are therefore less likely to obtain licenses in an open bidding market.⁹³ Another party, Impulse Telecommunications Corporation, states that "giants" can justify huge bids because they have billions of dollars of capital as well as an existing administrative, billing,

⁹¹ See H.R. Rep. No. 103-111 at 255.

⁹² Ex parte filing of DCR Communications, May 31, 1994.

⁹³ NTIA Comments at 26.

operating and marketing infrastructure. In addition, Impulse asserts that PCS licenses are likely to hold strategic value for large long distance and local telephone companies, for such purposes as critical wireless access.⁹⁴ Similarly, Tri-State Radio Company states that the allocation of substantial amounts of spectrum to services such as broadband PCS has generated extensive industry expectation and speculation. With the financial stakes so high, Tri-State argues that designated entities will have little ability to bid successfully against "communications behemoths with almost unlimited financial resources."⁹⁵

121. We agree that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business. In the Notice, we proposed that one means to address such problems would be to set aside specific spectrum blocks in broadband PCS that would be reserved for bidding purposes to the designated entities.⁹⁶ In this Order, we have decided to adopt a modification of this proposal, which should greatly enhance the ability of all designated entities to enter auctions and bid successfully for broadband PCS licenses. Specifically, we establish two entrepreneurs' blocks, C and F, in which eligibility to bid is limited to entities that, together with their affiliates and certain investors, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million. In addition, we will prohibit an applicant from bidding in these blocks if any one individual investor in the applicant has \$100 million or greater in personal net worth. Together with a reduced upfront payment requirement, we believe this proposal will encourage smaller entities to enter the auctions for broadband PCS licenses and will ensure that "entrepreneurial" businesses are granted nearly half of all the broadband PCS licenses being auctioned.

122. NTIA strongly supports this measure, arguing that it "would be the most direct mechanism for preserving opportunities for small companies in an auction environment." According to NTIA, reserving two entrepreneurs' blocks helps significantly in satisfying the congressional directive that competitive bidding not result in an increase in concentration in

⁹⁴ Ex parte filing of Impulse Telecommunications Corporation, May 27, 1994.

⁹⁵ Tri-State Comments at 11. See also comments of NAMTEC (designated entities should not have to compete against "more entrenched parties"), National Rural Telecom Association (the only way small entities can have real opportunity is if they do not have to bid against "extremely 'deep pocket' applicants"), The Small Business PCS Association (it will not be possible for designated entities "to compete in an auction against some of the largest companies and wealthiest individuals in the United States"), JMP (without preferences for designated entities, large telecommunications firms will "monopolize" the auctions), Minority PCS Coalition at 6, Telephone Association of Michigan at 9-10, Iowa Network at 9, AWRP at 8, Telephone Electronics at 7-8, Sloan at 2.

⁹⁶ Notice at ¶ 121.

the telecommunications industries.⁹⁷ Similarly, Columbia PCS contends that establishment of entrepreneurs' blocks "provides a good balance between Congress's clear mandate to provide opportunities for designated entities and avoid undue concentration of PCS licenses on the one hand with the goal of capturing the value of allocated spectrum for the American public on the other."⁹⁸

123. The \$125 million gross revenue/\$500 million asset caps have the effect of excluding the large companies that would easily be able to outbid designated entities and frustrate Congress's goal of disseminating licenses among a diversity of licensees. At the same time, this restriction does not exclude many firms that, while not large in comparison with other telecommunications companies, nevertheless are likely to have the financial ability to provide sustained competition for the PCS licensees on the MTA blocks. For example, the \$125 million gross revenue figure corresponds roughly to the Commission's definition of a Tier 2, or medium-sized, local exchange carrier,⁹⁹ and would include virtually all of the independently owned rural telephone companies. Limiting the personal net worth of any individual investor or affiliate of the applicant to \$100 million will prevent a very wealthy individual from leveraging his or her personal assets to allow the applicant to circumvent the size limitations of the entrepreneurs' blocks.

⁹⁷ Ex parte filing of NTIA, June 21, 1994.

⁹⁸ Ex parte filing of Columbia PCS, June 2, 1994. Columbia PCS further states that this measure would spur investment in designated entities and increase their ability to compete against one another and others. Id.

⁹⁹ Local exchange carriers are categorized as Tier 1 and Tier 2 companies by applying the criterion that Sections 32.11(a) and 32.11(e) of the Commission's Rules use to distinguish Class A and Class B companies, respectively. Class A companies are those companies having annual revenues from regulated telecommunications operations of \$100 million or more; Class B companies are those companies having annual revenues from regulated telecommunications operations of less than \$100 million. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. A company's classification is changed when its annual operating revenue exceeds or is under the \$100 million mark in each of five consecutive years. The Commission imposes more relaxed regulatory requirements on Tier 2 LECs than on Tier 1 LECs. See Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, 2 FCC Rcd 5770, 5772 (1987), Commission Requirements for Cost Support Material to be Filed with 1994 Annual Access Tariffs and for Other Cost Support Material, 9 FCC Rcd 1060 n. 3 (Comm. Carr. Bur. 1994); Commission Requirements for Cost Support Material to be Filed with Access Tariffs on March 1, 1985, Public Notice, Mimeo No. 2133 (Comm. Carr. Bur. released Jan. 25, 1985).

124. As noted previously, many commenters asked us to reserve spectrum blocks for bidding only by designated entities. The entrepreneurs' blocks plan adopted herein is similar in concept to the set-aside proposals set forth by the commenters. Therefore, in determining which of the blocks in each market should constitute the entrepreneurs' blocks, we paid close attention to the concerns of those who had advocated set-asides in the first instance. Although the broadband PCS band plan has changed since the Commission first proposed set-asides in the Notice and parties first submitted their proposals in this docket, the general concerns of these parties about the amount of spectrum and geographic territory necessary to compete effectively remain pertinent. Moreover, we adopted the revised broadband PCS band plan in advance of this Order, which afforded interested parties the opportunity to make additional presentations on designated entity incentives in light of the new band plan.

125. A number of commenters approved of the Notice's proposal to set aside one 20 MHz BTA block and one 10 MHz BTA block. The Small Business PCS Association asserted, moreover, that implementation of the set-aside proposal would offer "a major opportunity" for small businesses, that a 20 MHz block is "probably ideal" for development by small entrepreneurs, and that even a 10 MHz block could sustain a viable PCS System.¹⁰⁰ Telepoint makes similar assertions.

126. A considerable number of commenters, however, contended that the Commission's proposal to set aside a 20 MHz block and a 10 MHz block would be inadequate. Telephone Electronics and AWCC asserted, for instance, that a provider operating with only a 10 MHz or 20 MHz license could not offer a full range of PCS services with quality equivalent to the like offerings of a provider operating with a 30 MHz license. Unique and AWCC thus argued that PCS licensees in the set-aside spectrum would consequently be unable to obtain commercial funding on terms as favorable to those available to operators with 30 MHz licenses. Independent Cellular Network maintained that the competitive disadvantages of the proposed set-aside channels, due to their lesser bandwidth, could not be obviated through aggregation, because of the greater transaction costs that would be incurred above those associated with acquisition of a single 30 MHz license.

127. We believe that designating frequency blocks C and F as entrepreneurs' blocks meets the concerns of most of the designated entity commenters. Frequency block C provides 30 MHz of spectrum and, thus, satisfies the concerns of those parties who believe they must have this amount of bandwidth to compete effectively. The 10 MHz block F license, on the other hand, fulfills the needs of other designated entities who argued in favor of smaller

¹⁰⁰ The Small Business PCS Association stated that a small business operating in a single BTA service region could effectively compete with large companies operating in larger service areas. This is so, it contended, mainly because PCS providers with large service areas would not realize such great economies of scale as many have supposed and because small firms could counter such advantages by forming buying cooperatives. Comments of Small Business PCS Association at 2-3.

blocks. Moreover, since the C and F blocks are adjacent, they can be aggregated efficiently by one or more licensees. This plan also makes available to eligible bidders in the entrepreneurs' blocks 986 licenses, or slightly under 50 percent of all broadband PCS licenses. Finally, it does not foreclose opportunities for other parties. Bidders ineligible for the entrepreneurs' blocks will have the opportunity to bid on 99 30 MHz MTA licenses throughout the country, as well as 986 10 MHz BTA licenses nationwide.

128. Five-Year Holding and Limited Transfer Period In establishing the entrepreneurs' blocks, we recognize the congressionally mandated objective will not be served if parties take advantage of bidding in these blocks and immediately assign or transfer control of the authorizations to other entities. Such a practice could unjustly enrich the auction winners and would undermine the congressional goal of giving designated entities the opportunity to provide spectrum-based services. Therefore, we will prohibit licensees in the entrepreneurs' blocks from voluntarily assigning or transferring control of their licenses for a period of three years from the date of the license grant.¹⁰¹ And, for the next two years of the license term, we will permit the licensee to assign or transfer control of its authorization only to an entity that satisfies the entrepreneurs' blocks entry criteria.¹⁰² During this five-year period, licensees will continue to be bound by the financial eligibility requirements, as set forth below.¹⁰³ In addition, a transferee or assignee who receives a C or F block license during the five-year period will remain subject to the transfer restrictions for the balance of the holding period.¹⁰⁴ The Commission will conduct random pre and post-auction audits to ensure that applicants receiving preferences are in compliance with the FCC's rules.

¹⁰¹ We will consider exceptions to this three-year holding period rule on a case-by-case basis in the event of a judicial order decreeing bankruptcy or a judicial foreclosure if the licensee proposes to assign or transfer its authorization to an entity that meets the financial thresholds for bidding in the entrepreneurs' blocks. In addition, we note that a transfer is considered "involuntary" if it is made pursuant to a court decree requiring the sale or transfer of the licensee's stock or assets. Paramount Pictures, Inc., 43 FCC 453 (1949); Cf. William Penn Broadcasting, 16 FCC 2d 1050 (1969).

¹⁰² We note that a licensee assigning its authorization pursuant to this limited transfer period might be subject to the repayment provisions associated with installment payments and bidding credits. See infra ¶¶ 134, 141. We also clarify that rural telephone companies receiving partitioned licenses in the entrepreneurs' blocks are subject to this five-year holding and limited transfer period.

¹⁰³ See infra ¶¶ 156-168. In addition, for purposes of the installment payment and bidding credit provisions set forth below, licensees will continue to be bound by the financial eligibility requirements throughout the term of the license.

¹⁰⁴ For example, if a C-block authorization is assigned to an eligible business in year four of the license term, it will be required to hold that license until the original five-year period expires, subject to the same exceptions that applied to the original licensee.

129. Our goals are to create significant opportunities for entrepreneurs, small businesses, and businesses owned by minorities and women to compete in auctions for licenses and attract sufficient capital to build-out those licenses and provide service. We recognize the critical need to attract capital, which requires flexibility. We are very concerned, however, that such flexibility not undermine our more fundamental objective, which is to ensure that designated entities retain de facto and de jure control of their companies at all times. We believe that the five-year holding and limited transfer period, which we have adopted in this Order, will help to promote this objective. Some question remains, however, as to whether a longer holding period (e.g., seven years) would more fully meet this goal.

E. Bidding Credits

130. In the Notice, we indicated that we might use spectrum set-asides for designated entities in the broadband PCS service but did not expressly propose to use bidding credits. For two other services, IVDS and narrowband PCS, however, we did conclude recently that the use of bidding credits in auctions would be an effective tool to ensure that women and minority-owned businesses have opportunities to participate in the provision of those services.¹⁰⁵ On further reflection, and based on the many comments in the record favoring this approach, we believe that bidding credits are necessary to ensure that women and minority-owned businesses and small businesses participate in broadband PCS. Accordingly, we adopt a bidding credit plan for winning bidders in the entrepreneurs' blocks that gives small businesses a 10 percent credit, women and minority-owned businesses a 15 percent credit, and small businesses owned by women and minorities an aggregate credit of 25 percent.

131. At the outset, we note that we are confining the bidding credit option to the entrepreneurs' blocks because, given the extremely capital intensive nature of broadband PCS, we do not think bidding credits in an uninsulated block would have a meaningful effect.¹⁰⁶ Indeed, in ex parte presentations to the Commission, many commenters have indicated that, without spectrum set-asides for broadband PCS, bidding credits would not be sufficient to assist designated entities in outbidding very large entities who are likely to bid for licenses in this service. DCR Communications states, for example, that all of the existing large telecommunications carriers can justify much larger payments for licenses than could an individual entrepreneur, regardless of a bidder's credit. Therefore, it believes no entrepreneur will win a bid for any PCS market that is desirable to any of the large companies.¹⁰⁷ Many

¹⁰⁵ See Third Report and Order, FCC 94-98, 9 FCC Rcd ____ (released May 10, 1994); Fourth Report and Order, 9 FCC Rcd 2330 (released May 10, 1994).

¹⁰⁶ We also are concerned that allowing bidding credits in the MTA blocks would increase substantially the incentive for businesses to engage in shams and fronts.

¹⁰⁷ Ex parte filing of DCR, May 31, 1994, at 4-5.

other commenters echo this concern.¹⁰⁸ Some state that, if bidding credits alone are used, extraordinarily large credits, even on the order of 50 percent or more, would be ineffective.¹⁰⁹ As described above, in order to afford designated entities a realistic opportunity to obtain licenses in the broadband PCS service, we have taken measures to exclude very large businesses from bidding for licenses in the C and F blocks. These measures will enhance the value of the bidding credits for small businesses and businesses owned by minorities and women. In this context, we believe that bidding credits will have a significant effect on the ability of small businesses and businesses owned by women and minorities to participate successfully in auctions for licenses in these blocks.

132. As explained above, the capital access problems faced by small firms and women and minority-owned firms make special provisions like bidding credits appropriate for these designated entities in broadband PCS.¹¹⁰ In effect, the bidding credit will function as a discount on the bid price a firm will actually have to pay to obtain a license and, thus, will address directly the financing obstacles encountered by these entities. Moreover, as noted previously, women and minorities face discrimination in lending and other barriers to entry not encountered by other firms, including other designated entities. Therefore, as one of the measures designed to counter these increased capital formation difficulties, we will provide them with a slightly higher bidding credit than that granted to small businesses. Thus, women and minorities will receive a 15 percent payment discount that is applied against the amounts they bid on licenses. Absent such measures targeted specifically to women and minorities, it would be virtually impossible to assure that these groups achieve any meaningful measure of opportunity for actual participation in the provision of broadband PCS. Similarly, it is reasonable to assume that small firms owned by women and minorities suffer the problems endemic to both groups and that a cumulative bidding credit of 25 percent is therefore appropriate. We believe that these measures will help women and minorities to attract the capital necessary for obtaining a license and constructing and operating a broadband PCS system, consistent with the intent of Congress.

¹⁰⁸ See ex parte filings of DigiVox Corporation, May 31, 1994, at 3 (the use of bidding credits to the exclusion of frequency set-asides will not fulfill the objectives of Section 309(j)), Communications International Wireless Corp., May 27, 1994, at 1 (bidding credits alone cannot level the playing field between designated entities and members of the Fortune 100 companies), CWCC, May 27, 1994, at 2 (bidding credits alone cannot level the playing field for designated entities).

¹⁰⁹ Ex parte filings of AWCC, May 26, 1994 at 2, Columbia PCS, June 2, 1994 at 2.

¹¹⁰ Although we did not grant bidding credits to small businesses in the narrowband PCS or IVDS services, we believe that, given the exponentially greater expense likely to be incurred in acquiring broadband PCS licenses and construct the systems, bidding credits are a proper means to ensure that these firms have the opportunity to participate in this service. We note that for narrowband PCS and IVDS, the cost of license acquisition and implementation of service is anticipated to be considerably more modest.

133. The definition of a minority or women-owned firm and of a small business are set forth below.¹¹¹ To receive a 10 percent bidding credit, a small business must satisfy a gross revenue test. As explained more fully below in the small business definition section, a consortium consisting entirely of small businesses also is eligible for a 10 percent bidding credit even if the combined gross revenues of the consortium exceed the small business gross revenues threshold. In addition, a small business that is owned by women and minorities must satisfy the definition of a business owned by minorities and women as well as the small business definition to receive a 25 percent bidding credit. Finally, a consortium of small firms owned by women and/or minorities is eligible for a 25 percent bidding credit, provided that each member of the consortium meets the definition of a small business and a minority and/or women-owned firm.

134. Unjust Enrichment Applicable to Bidding Credits To ensure that bidding credits benefit the parties to whom they are directed, we adopt strict repayment penalties. If, within the original term, a licensee applies to assign or transfer control of a license to an entity that is not eligible for as high a level of bidding credit, then the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify must be paid to the U.S. Treasury as a condition of approval of the transfer. For example, an assignment of a license from a small minority-owned firm to a women-owned firm with revenues greater than \$40 million would require repayment of 10 percent of the original bid price (25 percent less 15 percent) to the Treasury. A sale to an entity that would not qualify for bidding credits will entail full payment of the bidding credit as a condition of transfer. Small businesses also will be bound by the financial eligibility rules during the entire license term as set forth below. Thus, if after licensing an investor purchases an "attributable" interest in the business and, as a result, the gross revenues of the firm exceed the \$40 million small business cap, this repayment provision will apply.¹¹² These repayment provisions apply throughout the original term of the license to help promote the long-term holding of licenses by those parties receiving bidding credits.

F. Installment Payments

135. A significant barrier for most businesses small enough to qualify to bid in the entrepreneurs' blocks will be access to adequate private financing to ensure their ability to compete against larger firms in the PCS marketplace.¹¹³ In the Second Report and Order, we concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for

¹¹¹ See infra ¶¶ 172-192.

¹¹² See infra ¶¶ 158-168, for a discussion of which investor interests are "attributable" for purposes of calculating the gross revenues caps.

¹¹³ See e.g., comments of SBA Chief Counsel of Advocacy at 6, 20-21, NTIA at 27; SBAC Report at 2 (September 15, 1993).

the auctioned spectrum. We also determined that small businesses eligible for installment payments would only be required to pay half of the down payment (10 percent of the winning bid, as opposed to 20 percent) five days after the auction closes, with the remaining 10 percent payment deferred until five days after grant of the license. Finally, we indicated that installment payments should be made available to small businesses at an interest rate equal to the rate for U.S. Treasury obligations. See Second Report and Order at ¶¶ 236-240.

136. In light of the expected substantial capital required to acquire and construct broadband PCS licenses, we conclude that installment payments are an appropriate measure for most businesses that obtain broadband PCS licenses in the entrepreneurs' blocks. By allowing payment in installments, the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to and after the auction. Such low cost government financing will promote long-term participation by these businesses, which, because of their smaller size, lack access to sufficient capital to compete effectively with larger PCS licensees. Under the rules we adopt today, installment payments are available to smaller entities that do not technically qualify as small businesses for purposes of other measures we have adopted, such as bidding credits. We believe, however, that, given the enormous costs of broadband PCS and the likelihood of very large participants in the other blocks, this option is fully consistent with the congressional intent in enacting Section 309(j)(4)(A) to avoid a competitive bidding program that has the effect of favoring incumbent providers of other communications services, with established revenue streams, over smaller entities.¹¹⁴

137. Under the plan we adopt here, all licensees that satisfy the gross revenues, total assets and personal net worth criteria to bid in the entrepreneurs' blocks will be allowed to pay in installments for licenses granted in those blocks in the 50 largest BTAs. In the smaller BTAs, however, only businesses owned by women and minorities and those licensees with less than \$75 million in gross revenues will be able to use installment payments.¹¹⁵ This distinction is based on the expected lower costs to acquire licenses and construct systems in the smaller BTAs. Thus, with the exception of companies owned by women or minorities, which face additional problems accessing capital, we do not think that a firm with gross revenues exceeding \$75 million will require government financing to be competitive in the

¹¹⁴ See H.R. Rep. No. 103-111 at 255 (Commission has the authority to design alternative payment schedules in order that the auction process does not inadvertently favor only those with "deep pockets" over new or small companies).

¹¹⁵ We will apply the same \$500 million total assets and \$100 million personal net worth standards for purposes of determining eligibility for installment payments in all BTAs. The attribution rules set forth with regard to eligibility to bid in the entrepreneurs' blocks also will apply in all BTAs. See infra ¶¶ 158-168.

smaller BTAs.¹¹⁶

138. The installment payment option will enable qualified businesses to pay their winning bid over time. These businesses must make the applicable upfront payment in full before the auction, but are required to make a post-auction down payment equaling only ten percent of their winning bids, half of which will be due five business days after the auction closes. Payment of the other half of the down payment will be deferred until five business days after the license is granted. In general, the remaining 90 percent of the auction price will be paid in installments with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Under this general rule, only payments of interest will be due for the first year with principal and interest payments amortized over the remaining nine years of the license. Timely payment of all installments will be a condition of the license grant and failure to make such timely payment will be grounds for revocation of the license.¹¹⁷

139. Enhanced Installment Payments As explained previously, small businesses and businesses owned by minorities and women face capital access difficulties not encountered by other firms and, thus, require special measures to ensure their opportunity to participate in broadband PCS. Accordingly, we will provide an "enhanced" installment payment plan for these entities. Pursuant to this enhanced installment payment plan, small businesses (as defined below) who win licenses in the entrepreneurs' blocks will be required to pay interest only for the first two years of the license term at the same interest rate as set forth in the general rule. Businesses owned by women and/or minorities will be able to make interest-only payments for three years. Interest will accrue at the Treasury note rate without the additional 2.5 percent.¹¹⁸ And, finally, businesses that are both small and owned by women and/or minorities will be required to pay only interest for five years. Interest will accrue at the Treasury note rate.

140. These enhanced installment payments are narrowly tailored to the needs of the various designated entities, as reflected in the record in this proceeding. We believe that varying the moratorium on principal in the early years of the loan and varying the interest rate based on these needs will allow small businesses and companies owned by women and/or

¹¹⁶ We note that a consortium of small businesses is eligible for installment payments in any market so long as each member of the consortium satisfies the definition of a small business, as set forth in Section VII.J.2, infra.

¹¹⁷ As described in the Second Report and Order, the Commission may, on a case-by-case basis, permit a three to six month grace period within which a licensee may seek a restructuring of the payment plan.

¹¹⁸ To be eligible for these "enhanced" installment payments, a firm must satisfy either of the two alternative definitions of a woman or minority-owned business, as set forth in ¶¶ 181-192, infra, as well as the applicable financial caps.

minorities to bid higher in auctions, thereby increasing their chances for obtaining licenses. In addition, it will allow them to concentrate their resources on infrastructure build-out and, therefore, it will increase the likelihood that they become viable PCS competitors.

141. Unjust Enrichment Applicable to Installment Payments To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we will use the unjust enrichment provisions adopted in the Second Report and Order applicable to installment payments. Specifically, if a licensee that was awarded installment payments seeks to assign or transfer control of its license to an entity not meeting the applicable eligibility standards set out above during the term of the license, we will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer. See Second Report and Order at ¶ 263; 47 C.F.R. § 1.2111(c). Moreover, if an entity seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan, if any, for which the acquiring entity qualifies will become effective immediately upon transfer. Thus, a higher interest rate and earlier payment of principal may begin to be applied. For example, a transfer of a license in the fourth year after license grant from a small minority-owned firm to a small non-minority owned firm would require that the firm begin principal payments and the balance would begin accruing interest at a rate 2.5 percent above the rate that had been in effect.¹¹⁹ Finally, if an investor subsequently purchases an "attributable" interest in the businesses and, as a result, the gross revenues or total assets of the business exceed the applicable financial caps, this unjust enrichment provision will also apply.¹²⁰

G. Tax Certificates

142. Congress instructed the Commission to consider the use of tax certificates to help ensure designated entity participation in spectrum-based services. See 47 U.S.C. § 309(j)(4)(D). In the Second Report and Order we observed that tax certificates could be useful as a means of attracting investors to designated entity enterprises and to encourage licensees to assign or transfer control of licenses to designated entities in post-auction transactions. We stated further that we would examine the feasibility of using this measure in

¹¹⁹ We recognize that because of the five-year holding and limited transfer requirements in the entrepreneurs' blocks, these unjust enrichment provisions have limited applicability during the first five years of the license term. Nevertheless, there are some situations in which licensees are permitted to assign or transfer their licenses during this period and the provisions would then apply if the buyer would not have been qualified for installment payments or as favorable an installment payment plan. Furthermore, the unjust enrichment provisions are applicable for the full ten-year license term.

¹²⁰ See infra ¶¶ 158-168, for a discussion of which investor interests are "attributable" for purposes of calculating the gross revenues and total assets thresholds.

subsequent service-specific auction rules. Second Report and Order at ¶ 251.

143. We believe that tax certificates, which allow the recipients to defer capital gains taxes made on sales, are an appropriate tool to assist women and minority-owned businesses to attract start-up capital from non-controlling investors in broadband PCS. As explained above, due to discrimination in private lending markets and other factors, these designated entities face added obstacles in accessing capital. Therefore, in order to ensure that such businesses have a meaningful opportunity to participate in auctions, it is necessary to adopt measures to encourage investment in minority and woman-owned companies. Moreover, because of the severe underrepresentation of women and minorities in telecommunications, we believe that it is appropriate to give PCS licensees the incentive, through the grant of tax certificates, to assign or transfer their authorizations to such entities in post-auction sales. This measure will provide added assurance that minority and women-owned entities have the opportunity to participate in broadband PCS services, as mandated by Congress. Accordingly, we will issue tax certificates to non-controlling initial investors in minority and women-owned broadband PCS applicants (in any frequency block), upon the sale of their non-controlling interests. We will also issue tax certificates to broadband PCS licensees (in any frequency block) who assign or transfer control of their licenses to minority and women-owned entities.

144. We have used tax certificates over the years to encourage broadcast licensees and cable television operators to transfer their stations and systems to minority buyers.¹²¹ We also have granted tax certificates to shareholders in minority-controlled broadcast or cable entities who sell their shares, when such interests were acquired to assist in the financing of the acquisition of the facility.¹²² These broadcast and cable tax certificates are issued pursuant to the Internal Revenue Code, 26 U.S.C. § 1071. While Congress' goal in authorizing tax certificates under Section 309(j)(4)(D) of the Act is somewhat different, and focuses on ensuring the opportunity for designated entities to participate in auctions and spectrum-based services, we think that tax certificates will be equally valuable in the broadband PCS context. Issuance of tax certificates to investors in minority and women-owned businesses and licensees that sell to minorities and women will augment the other measures we adopt today to encourage minorities and women to participate in broadband PCS and will increase the ability of these entities to access financing for that purpose.

145. In implementing this program, we will borrow from our existing tax certificate program and grant tax certificates, upon request, that will enable the licensees and investors meeting the criteria outlined here to defer the gain realized upon a sale by: (1) treating it as

¹²¹ See 1982 Policy Statement; 1978 Policy Statement. We have also employed tax certificates as a means of encouraging fixed microwave operators to relocate from spectrum allocated to emerging technologies. See Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92-9, 8 FCC Rcd 6589 (1993).

¹²² See 1982 Policy Statement, 92 FCC 2d at 855-58.

an involuntary conversion under 26 U.S.C. § 1033, with the recognition of gain avoided by the acquisition of qualified replacement property; or (2) electing to reduce the basis of certain depreciable property; or both. Tax certificates will be available to initial investors in minority and woman-owned businesses who provide "start-up" financing, which allows these businesses to acquire licenses at auction or in the post-auction market, and those investors who purchase interests within the first year after license issuance, which allows for the stabilization of the designated entities' capital base. The definition of a minority or women-owned entity is set forth below¹²³ and, with regard to our investor tax certificate policy, the entity in which the investment is made must satisfy that definition at the time of the original investment as well as after the investor's shares are sold. For post-auction market sales, tax certificates will be issued only to licensees who sell to entities that meet that definition. Tax certificates will be granted only upon completion of the sale, although parties may request a declaratory ruling from the Commission regarding the tax certificate consequences of prospective transactions.

146. One-Year Holding Period As with our other tax certificate policies, we are concerned about avoiding "sham" arrangements to obtain tax certificates and, pursuant to Section 309(j)(4)(E), thus adopt measures to prevent abuses. As in our existing tax certificate program,¹²⁴ we will impose a one-year holding requirement on the transfer of control or assignment of broadband PCS licenses by women and minority-owned businesses who obtained such licenses through the benefit of tax certificates. We believe that the rapid resale of such licenses at a profit would subvert our goal of ensuring the opportunity to participate by minority or woman-owned businesses. If the buyer itself is a women or minority-owned business, however, our objectives still will be satisfied. Thus, as an exception to the holding requirement, we will permit the assignment or transfer of control of licenses during this period to other qualified minority and women-owned businesses. We note, however, that the assignee or transferee who receives this license before the end of the original one-year holding period will also be subject to a one-year holding requirement, from the date of consummation of the assignment or transfer.

147. Finally, in the Broadband PCS Reconsideration Order, we indicated that we would address in this proceeding proposals for issuing tax certificates to cellular operators who divest their cellular holdings in order to come into compliance with our rules governing cellular operators' participation in broadband PCS. Several commenters argued that tax certificates should be issued to all such companies who divest their holdings.¹²⁵ To accomplish the directive in Section 309(j)(4)(D) that minority groups and women are given the opportunity to participate in the provision of spectrum-based services, we have decided to

¹²³ See infra ¶¶ 181-192.

¹²⁴ See Amendment of Section 73.3597 of the Commission's Rules, Memorandum Opinion and Order, 99 FCC 2d 971, 974 (1985).

¹²⁵ See, e.g., Petitions for Reconsideration of GTE Service Corporation and Comcast Corporation of Second Report and Order in GEN Docket 90-314.

issue tax certificates to such cellular companies so long as their cellular interests are divested to businesses owned by minorities and/or women, as defined in this order. In this manner, we can further implement Congress's goal to facilitate the participation of minorities and women in spectrum-based services. We will also impose a one-year holding period requirement on the assignment or transfer of control of cellular licenses obtained by women and minority-owned businesses through the benefit of this tax certificate policy.

H. Provisions for Rural Telephone Companies

148. After the release of the Second Report and Order, rural telephone companies made numerous ex parte presentations concerning how we can best ensure that rural areas are provided broadband PCS. In addition, we have received several petitions for reconsideration of the Second Report and Order that address our definition of rural telephone companies in the generic auction rules. In this Order, we address the treatment of rural telephone companies for purposes of competitive bidding for broadband PCS licenses and address below some of the issues raised in petitions for reconsideration of the Second Report and Order concerning the definition of these entities.

149. In the Broadband PCS Reconsideration Order, we adopted an important measure that will help rural telephone companies become viable providers of PCS services. In response to numerous requests from rural telephone company interests, we increased from 20 percent to 40 percent the cellular attribution threshold for rural telephone companies with non-controlling cellular interests in their areas. See Broadband PCS Reconsideration Order at ¶ 125. This action increases the number of rural telephone companies that will be eligible to hold PCS licenses. In taking this action, we recognized that their existing infrastructure makes rural telephone companies well suited to introduce PCS services rapidly into their service areas and adjacent areas. Thus, this action will help speed service to rural areas, which tend to be less profitable to serve for companies without existing infrastructure than more densely populated urban areas.

150. We suggested in the Second Report and Order that allowing broadband PCS licenses to be geographically partitioned may be a means to permit rural telephone companies to hold licenses to provide service in their telephone service areas.¹²⁶ Many rural telephone companies proposed some form of partitioning in their comments, arguing that if they were required to bid on entire BTA or MTA licenses to obtain licenses covering their wireline service areas, they would be effectively barred from entering the broadband PCS industry.

¹²⁶ See Second Report and Order at ¶ 243, n. 186. We note that although we stated in n. 186 that we would consider partitioning for rural telephone companies in the reconsideration of the broadband PCS service rules, we have concluded that this issue should be addressed along with other issues concerning designated entities. See Broadband PCS Reconsideration Order at ¶ 83, n. 113. In our deliberations on this issue, we incorporate into this proceeding the record developed in GEN Docket No. 90-314.

They contend that under a partitioning plan, they would be able to serve areas in which they already provide service, while the remainder of the PCS service area could be served by other providers. Such a plan, they argue, would encourage rural telephone companies to take advantage of existing infrastructure in providing PCS services, thereby speeding service to rural areas.¹²⁷ We believe that these proposals have merit, and therefore we now adopt a license partitioning system to provide these designated entities the enhanced opportunity to participate in the provision of broadband PCS and to deploy broadband PCS in their rural service areas rapidly.

151. Our partitioning system will allow rural telephone companies to obtain broadband PCS licenses that are geographically partitioned from larger PCS service areas. These companies will be permitted to acquire partitioned broadband PCS licenses in either of two ways in any frequency blocks: (1) they may form bidding consortia consisting entirely of rural telephone companies to participate in auctions, and then partition the licenses won among consortia participants, and (2) they may acquire partitioned broadband PCS licenses from other licensees through private negotiation and agreement either before or after the auction. Each rural telephone company member of a consortium will, following the auction, be required to file a long-form application for its respective, mutually agreed-upon geographic area. If rural telephone company consortia are formed to bid on licenses in the entrepreneurs' blocks, the eligibility rules for those blocks will apply (*i.e.*, the cumulative gross revenues and assets of the consortium members may not exceed the financial caps for eligibility in these blocks).¹²⁸ We will require that partitioned areas conform to established geopolitical boundaries (such as county lines) and that each area include all portions of the wireline service area of the rural telephone company applicant that lies within the PCS service area. In addition, if a rural telephone company receives a partitioned license post-auction from another PCS licensee, the partitioned area must be reasonably related to the rural telephone company's wireline service area that lies within the PCS service area.¹²⁹ We recognize that rural telephone companies will require some flexibility in fashioning the areas in which they will receive partitioned licenses, so we do not adopt a strict rule concerning the reasonableness of the partitioned area. Generally, we will presume as reasonable a partitioned area that contains no more than twice the population of that portion of a rural telephone company's wireline service area that lies within the PCS service area. Each licensee in each

¹²⁷ See, *e.g.*, comments of GVNW at 2-4, Rural Cellular Association at 16, U.S. Intelco at 16.

¹⁶⁰ See *supra* ¶ 164.

partitioned area will be responsible for meeting the build-out requirements in its area.

152. Allowing partitioning of rural areas served by rural telephone companies provides a viable opportunity for many of these designated entities who desire to offer PCS to their customers as a complement to their local telephone services. For example, rural telephone companies who cannot afford or do not desire to bid for or construct PCS systems for an entire BTA can thus acquire licenses in areas they wish to serve or form bidding consortia and partition the entire BTA among themselves. We believe that rural partitioning is an efficient method of getting a license in the hands of an entity that will provide rapid service to rural areas.

153. We have decided not to adopt any other auction-related measures specifically for rural telephone companies in this Order. We believe that the partitioning plan we are adopting will provide rural telephone companies with substantial capabilities to acquire licenses to provide broadband PCS in their rural telephone service areas, consistent with our statutory mandate. In addition, our eligibility criteria for bidding in the entrepreneurs' blocks, discussed below, will permit virtually all telephone companies whose service areas are predominantly rural to bid on licenses in frequency blocks C and F without competition from the large telephone companies and other deep-pocketed bidders. Thus, virtually all rural telephone companies will be able to bid for broadband PCS licenses and defer payment in accordance with the installment payment plans we are adopting for the entrepreneurs' blocks. We also note that if a rural telephone company meets the definition of a small business or a business owned by minorities and/or women, it would enjoy a bidding credit and "enhanced" installment payments applicable to those groups when bidding on licenses in these blocks. We do not think that any other measures are necessary in order to satisfy the statute's directive that we ensure that rural telephone companies have the opportunity to participate in the provision of spectrum-based services, and to satisfy our goals to ensure that PCS is provided to all areas of the country including rural areas.

I. Upfront Payments

154. Upfront payment requirements are designed to ensure that bidders are qualified and serious and to provide the Commission with a source of funds in the event that it becomes necessary to assess default or bid withdrawal penalties.¹³⁰ The upfront payment ensures that bids during the course of the auction are bona fide and convey information about the value of the underlying licenses. Our standard upfront payment for broadband PCS is \$0.02 per MHz per pop, which is equivalent to roughly six percent of the license value, based on an estimate in a Congressional Budget Office report of the total value of the auctionable spectrum.¹³¹ A number of commenters assert that the Commission could enhance the

¹³⁰ Second Report and Order, ¶¶ 169-80.

¹³¹ Id. at ¶ 177.

opportunity of designated entities to participate in competitive bidding by reducing the required upfront payment for those applicants.¹³² We agree that the \$0.02 per MHz per pop upfront payment requirement might impose a barrier for smaller entities wishing to participate in the auctions. Moreover, we note that most bidders in the entrepreneurs' blocks will be entitled to pay for their licenses in installments, which requires a down payment of only five percent of the winning bid. We are concerned that requiring an upfront payment that may be larger than the down payment that the winning bidder is required to tender could discourage auction participation.

155. For these reasons, we will reduce the upfront payment requirement to \$0.015 per MHz per pop for bidders in the entrepreneurs' blocks. This 25 percent discount should facilitate auction participation by capital-constrained companies and permit them to conserve resources for infrastructure development after winning a license. Moreover, since the upfront payment is still substantial, ranging from slightly below \$20,000 for a 30 MHz license in the smallest BTAs to more than \$10 million for the New York BTA, insincere bidding will be discouraged and the Commission will have access to funds if it must collect default or bid withdrawal penalty payments.

J. Definitions and Eligibility

1. Eligibility to Bid in the Entrepreneurs' Blocks

156. As noted previously, eligibility to bid in the two entrepreneurs' blocks, C and F, is limited to companies that, together with their affiliates and investors, had gross revenues of less than \$125 million in each of the last two years and have total assets of less than \$500 million at the time their short form applications are filed. In addition, we will prohibit an applicant from bidding in these blocks if any one individual investor or principal in the applicant has \$100 million or greater in personal net worth at the short form application filing date.

157. In determining whether an applicant satisfies these financial thresholds, we will count the gross revenues and total assets of the applicant as well as those of its investors with "attributable" interests. The subsection that follows discusses what interests are attributable for these purposes. In addition, it sets forth exceptions to these attribution rules for minority and women-owned applicants and for publicly-traded companies.

a. Attribution Rules for the Entrepreneurs' Blocks

158. Qualified "Entrepreneurs". As a general rule, the gross revenues and total assets

¹³² See e.g., comments of AWCC at 31-32, Minnesota Equal Access at 2, NAMTEC at 20, Rural Cellular Corp. at 2, U.S. Intelco at 22-23.

of all investors in, and affiliates of, an applicant are counted on a cumulative, fully-diluted basis for purposes of determining whether the \$125 million/\$500 million thresholds have been exceeded, and on an individual basis regarding the \$100 personal net worth standard.¹³³ There are two exceptions to this rule, however. First, applicants that meet the definition of a small business may, as discussed below, form consortia of small businesses that, on an aggregate basis, exceed the gross revenue/total asset caps. Second, the gross revenues, total assets, personal net worth, and affiliations of any investor in the applicant are not considered so long as the investor holds less than 25 percent of the applicant's passive equity. For corporations, we shall use the term passive equity investors to mean investors who hold only non-voting stock or de minimis amounts of voting stock that include no more than five percent of the voting interests. Where different classes of stock are held, however, the total amount of equity must still be less than 25 percent to meet this requirement. For partnerships, the term means limited partnership interests that do not have the power to exercise control of the entity.¹³⁴ The passive investor exception will be available, however, only so long as the applicant remains under the control of one or more entities or individuals (defined as the "control group") and the control group holds at least 25 percent of the applicant's equity and, in the case of corporate applicants, at least 50.1 percent of the voting stock.¹³⁵ In the case of partnership applicants, the control group must hold all the general partnership interests. Winning bidders are required to identify on their long-form applications the identity of the members of this control group and the means of ensuring control (such as a voting trust agreement). The gross revenues, total assets and personal net worth (if applicable) of each member of the control group and each member's affiliates will be counted toward the \$125 million gross revenues/\$500 million total assets thresholds or the individual \$100 million personal net worth standard, regardless of the size of the member's total interest in the applicant.

159. The attribution levels we have selected here are intended to balance the competing considerations that apply in this particular context and may differ from those we have used in other circumstances. As a general matter, the 25 percent limitation on equity

¹³³ By "fully-diluted," we mean that agreements such as stock options, warrants and convertible debentures will generally be considered to have a present effect and will be treated as if the rights thereunder already have been fully exercised.

¹³⁴ Applicants must be prepared to demonstrate that the limited partners do not have influence over the affairs of the applicant that is inconsistent with their roles as passive investors. For purposes of our rules, we presume that any general partner has the power to control a partnership. Therefore, each general partner in a partnership will be considered part of the partnership's control group.

¹³⁵ So long as the applicant remains under the de jure and de facto control of the control group, we shall not bar passive investors from entering into management agreements with applicants.

investment interests will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue/total asset caps. At the same time, it will afford qualified bidders a reasonable measure of flexibility in obtaining needed financing from other entities, while ensuring that such entities do not acquire controlling interests in the eligible bidders.¹³⁶ Similarly, the five percent threshold for attributing revenues of investors with voting stock in corporate applicants is designed to keep ineligible parties from exerting undue control over eligible firms.¹³⁷ For all of these reasons, we also will attribute the gross revenues and total assets of entities, or the personal net worth of individuals, that otherwise constitute "affiliates" of the applicant.¹³⁸

160. Qualified Woman and Minority-Owned "Entrepreneurs". As discussed above, the record demonstrates that women and minorities have especially acute problems in obtaining financing, due in part to discriminatory lending practices by private financial institutions. To address these special problems and to afford women and minority-owned businesses more flexibility in attracting financing, it is necessary to provide these entities with an alternative, somewhat more relaxed option regarding the attribution of revenues of passive investors. Under this alternative standard, we will not attribute to the applicant the gross revenues, assets, or net worth of any single investor in a minority or woman-owned applicant unless it holds more than 49.9 percent of the passive equity (which is defined to include as much as five percent of a corporation's voting stock). To guard against abuses, however, the control group of applicants choosing this option would have to own at least 50.1 percent of the applicant's equity, as well as retain control and hold at least 50.1 percent of the voting stock.¹³⁹ As discussed above with regard to general eligibility to bid in the entrepreneurs' blocks, winning bidders must identify on their long-form applications a control group (this time consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and/or women) and the gross revenues and net worth of each member of the control group and each member's affiliates will be counted toward the \$125 million gross revenue/\$500 million total asset thresholds or the individual \$100 million personal net worth limitation, regardless of the size of the member's total interest in the applicant.

¹³⁶ Several commenters have suggested that we establish an attribution threshold for investors in a broadband PCS applicant. See, e.g., ex parte filings of Columbia PCS, June 2, 1994 (20 percent threshold), and Impulse Telecommunications Corporation, May 27, 1994 (10 percent threshold).

¹³⁷ In the event that the five percent voting stock limitation proves to be overly restrictive, we may consider whether a higher threshold (e.g., 15 percent) would be sufficient to meet our concerns about undue control from large investors.

¹³⁸ The definition of an "affiliate" is set forth in subsection 5, infra.

¹³⁹ As noted previously, the control group of a partnership applicant must hold all of the general partnership interests.

161. Relaxing the attribution standard somewhat in determining eligibility of women and minority-owned companies to bid for licenses on frequency blocks C and F directly addresses what most commenters have stated to be the biggest obstacle to entry for these designated entities: obtaining adequate financing. By this measure, women and minorities who are eligible to bid in these blocks (*i.e.*, who otherwise meet the \$125 million gross revenues/\$500 million total asset standard) will be required to maintain control of their companies and, at the same time, will have flexibility to attract significant infusions of capital from a single investor. The requirement that the minority and women principals hold 50.1 percent of the company's equity mitigates substantially the danger that a well-capitalized investor with a substantial ownership stake will be able to assume *de facto* control of the applicant. Because this step gives large companies, who are otherwise ineligible to bid in the entrepreneurs' blocks, a significant incentive to "partner" with minority and women-owned firms, it will enhance the likelihood that these designated entities will be both successful in the auctions and become viable, long-term competitors in the PCS industry.

162. Of course, women and minority-owned firms, like any other applicant for a C or F block license, may sell a larger portion of their companies' equity, provided that they also abide by the general eligibility requirements to bid in the entrepreneurs' blocks. Specifically, the gross revenues, total assets and net worth of all investors holding 25 percent or more of the company's passive equity (as defined to include 5 percent or more of the voting stock) will be attributed toward the \$125 million/\$500 million caps or the \$100 million personal net worth standard. In this event, the control group will be required to hold at least 25 percent of the company's equity and 50.1 percent of its voting stock.

163. Qualified Publicly-Traded "Entrepreneurs". We also believe that these attribution rules may impose a particular hardship on publicly traded companies, which have little control over the ownership of their stock, and whose voting stock typically is widely held. Therefore, for purposes of determining eligibility to bid in the entrepreneurs' blocks, we adopt an exception from these rules for publicly traded companies.¹⁴⁰ Specifically, we will not attribute the gross revenues or total assets of a shareholder in a publicly traded company that owns up to 25 percent of the corporation's equity, even if that equity is represented by up to 15 percent of the voting stock. To take advantage of this exception, however, the eligible control group of the applicant still must control the corporation, hold at least 50.1 percent of the voting stock, and at least 25 percent of the company's equity.¹⁴¹

¹⁴⁰ "Publicly-traded company" shall mean a business entity organized under the laws of the United States whose shares, debt or other ownership interests are traded on an organized securities exchange within the United States.

¹⁴¹ We note that this exception for publicly held companies is only applicable for purposes of assessing eligibility to bid in the entrepreneurs' blocks and for the general installment payment option. In the event that a publicly traded company can demonstrate that the 15 percent threshold would impose a serious hardship, the Commission would entertain a

164. De Facto Control Issues. We shall codify in our rules a provision explaining more explicitly the term "control," so that applicants will have clear guidance concerning the requirement that a control group maintains de facto as well as de jure control of the firms that are eligible for special treatment under the rules for broadband PCS. For this purpose, we shall borrow from certain SBA rules that are used to determine when a firm should be deemed an affiliate of a small business.¹⁴² These SBA rules, which are codified in 13 CFR 121.401, provide several specific examples of instances in which an entity might have control of a firm even though the entity has less than 50 percent of the voting stock of a concern, and thus provide a useful model for our rules. Through reference to circumstances such as those described in the SBA rules, our rules will expressly alert designated entities that control of the applicant through ownership of 50.1 percent of the firm's voting interests may be insufficient to ensure de facto control of the applicant if, for example, the voting stock of the eligible control group is widely dispersed. In those and other circumstances, ownership of 50.1 percent of the voting stock may be insufficient to assure control of the applicant. Of course, apart from these structural issues relative to control, eligible entities must not, during the license term, abandon control of their licenses through any other mechanism. As we stated in the Second Report and Order, designated entities must be prepared to demonstrate that they are in control of the enterprise.¹⁴³

165. Financial Benefits. To ensure that the control group has a substantial financial stake in the venture, we shall adopt certain additional requirements, also borrowed from SBA rules. As noted previously, we shall require that at least 50.1 percent of each class of voting stock and at least 25 percent (or 50.1 percent for the alternative option for minority and women-owned businesses) of the aggregate of all outstanding shares of stock to be unconditionally owned by the control group members. In addition, 50.1 percent of the annual distribution of dividends paid on the voting stock of a corporate applicant concern must be paid to these members. Also, in the event stock is sold, the control group members must be

request to raise the threshold in individual cases. Companies seeking such relief must also demonstrate that raising the threshold would not contravene the Commission's control objectives, as described in this Order. We do not believe, however, that publicly traded corporations with individual shareholders owning up to 15 percent active equity require additional special provisions such as bidding credits, "enhanced" installment payments, or tax certificates to overcome capital access problems. Thus, we will not apply this exception with regard to the small business definition or the definition of a woman or minority-owned business.

¹⁴² As discussed below, these SBA affiliation rules also will be used as a basis for our own rules defining "affiliates" for purposes of determining whether particular entities meet the financial thresholds for bidding in the entrepreneurs' blocks or for qualifying as a small business.

¹⁴³ Second Report and Order at ¶ 278, citing Intermountain Microwave, 24 Rad. Reg. 983, 984 (1963).

entitled to receive 100 percent of the value of each share of stock in his or her possession. Similarly, in the event of dissolution or liquidation of the corporation, the control group members must be entitled to receive at least 25 percent (or 50.1 percent, as the case may be) of the retained earnings of the concern and 100 percent of the value of each share of the stock in his or her possession, subject, of course, to any applicable laws requiring that debt be paid before distribution of equity.

166. Partnerships and other non-corporate entities will be subject to similar requirements. Indicia of ownership that we will consider in non-corporate cases include (but are not limited to) (a) the right to share in the profits and losses, and receive assets or liabilities upon liquidation, of the enterprise pro rata in relationship to the designated entity's ownership percentage and (b) the absence of opportunities to dilute the interest of the designated entity (through capital calls or otherwise) in the venture. As with corporations, our concern is ensuring that the economic opportunities and benefits provided through these rules flow to designated entities, as Congress directed.

167. Application of the Five-Year Holding Rule. Finally, we explain how these attribution rules apply with regard to the five-year holding and limited transfer period for C and F block licensees. During this five-year period, a C or F block licensee must not sell more than 25 percent of its passive equity to a single investor if the resulting attribution of that investor's gross revenues or total assets would bring the company over the \$125 million gross revenues/\$500 million total assets thresholds, or if that investor's personal net worth exceeds the \$100 million personal net worth cap. Similarly, while individual members of the control group may change (if it would not result in a transfer of control of the company), the control group must maintain control and at least 25 percent of the equity and 50.1 percent of the voting stock.¹⁴⁴ A company will be permitted to grow beyond these gross revenues/total assets caps, however, through equity investment by non-attributable (i.e. passive) investors, debt financing, revenue from operations, business development or expanded service.¹⁴⁵

168. Abuses. As stated above, we intend by these attribution rules to ensure that bidders and recipients of these licenses in the entrepreneurs' blocks are bona fide in their eligibility, and we intend to conduct random audits both before the auctions and during the 10-year initial license period to ensure that our rules are complied with in letter and spirit. If we find that large firms or individuals exceeding our personal net worth caps are able to assume control of licensees in the entrepreneurs' blocks or otherwise circumvent our rules, we will not hesitate to force divestiture of such improper interests or, in appropriate cases, issue

¹⁴⁴ A minority or woman-owned company must continue to adhere to the attribution rules applicable to it, set out above.

¹⁴⁵ These rules will continue to apply in this manner throughout the license term with regard to a firm's continuing eligibility for installment payments, "enhanced" installment payments and bidding credits.

forfeitures or revoke licenses. In this regard, we reiterate that it is our intent, and the intent of Congress, that women, minorities and small businesses be given an opportunity to participate in broadband PCS services, not merely as fronts for other entities, but as active entrepreneurs.

b. Limit on Licenses Awarded in Entrepreneurs' Blocks

169. The special provisions which we adopt for designated entities are based, in part, on our mandate to fulfill the congressional goal that we disseminate licenses among a wide variety of applicants. 47 U.S.C. §309(j)(3)(B). Therefore, in adopting the financial assistance measures set forth in this Report and Order, we are concerned about the possibility, even if remote, that a few bidders will win a very large number of the licenses in the entrepreneurs' blocks. As a consequence, the benefits that Congress intended for designated entities would be enjoyed, in disproportionate measure, by only a few individuals or entities. Congress, in our view, did not intend that result. We shall therefore take steps to ensure that the financial assistance provided through our rules is dispersed to a reasonable number of applicants who win licenses in these blocks.

170. To achieve a fair distribution of the benefits intended by Congress, we shall impose a reasonable limit on the total number of licenses within the entrepreneurs' blocks that a single entity may win at auction. In setting this limit, we shall take care not to impose a restriction that would prevent applicants from obtaining a sufficient number of licenses to create large and efficient regional services. Specifically, we shall impose a limitation that no single entity may win more than 10 percent of the licenses available in the entrepreneurs' blocks, or 98 licenses. These licenses may all be in frequency block C or all in frequency block F, or in some combination of the two blocks. Such a limit will ensure that at least ten winning bidders enjoy the benefits of the entrepreneurs' blocks. At the same time, it will allow bidders to effectuate aggregation strategies that include large numbers of licenses and extensive geographic coverage.

171. Further, this limitation will apply only to the total number of licenses that may be won at auctions in these blocks; it is not an ownership cap that applies to licenses that might be obtained after the auctions. For purposes of implementing this restriction, we shall consider licenses to be won by the same entity if an applicant (or other entity) that controls, or has the power to control licenses won at the auction, controls or has the power to control another license won at the auction.

2. Definition of Small Business

172. In the Second Report and Order we adopted a definition for small businesses based on the standard definition used by the Small Business Administration (SBA). This definition permits an applicant to qualify for installment payments based on a net worth not in excess of \$6 million with average net income after Federal income taxes for the two

preceding years not in excess of \$2 million. 13 C.F.R. § 121.601.¹⁴⁶ In the Second Report and Order, we noted, however, that, in certain telecommunications industry sectors, this limit may not be high enough to encompass those entities that, while needing the assistance provided by installment payments, have the financial wherewithal to construct and operate the systems. Therefore we indicated that, on a service specific basis, we might adjust this definition upward to accommodate capital intensive telecommunications businesses. See Second Report and Order at ¶ 267.

173. Many commenters, including the Chief Counsel for Advocacy of the SBA, argue that the SBA net worth/net revenue definition is too restrictive and will exclude businesses of sufficient size to survive, much less succeed, in the competitive broadband PCS marketplace. The SBA's Chief Counsel for Advocacy and the Suite 12 Group advocate adoption of a gross revenue test, arguing that a net worth test could be misleading as some very large companies have low net worth. The SBA's Chief Counsel for Advocacy recommends that the revenue standard be raised to include firms that (together with affiliates) have less than \$40 million in gross revenues. Similarly, Suite 12 suggests a \$75 million in annual sales threshold.¹⁴⁷ As another option, the SBA's Chief Counsel for Advocacy suggests that the Commission consider a higher revenue ceiling or adopt different size standards for different telecommunications markets.¹⁴⁸

¹⁴⁶ The SBA has recently changed its net worth/net income standard as it applies to its Small Business Investment Company (SBIC) Program. See 59 Fed. Reg. 16953, 16956 (April 8, 1994). The new standard for determining eligibility for small business concerns applying for financial and/or management assistance under the SBIC program was increased to \$18 million net worth and \$6 million after-tax net income. 15 C.F.R. § 121.802(a)(3)(i). The change in this size standard was attributable to an adjustment for inflation and changes in the SBIC program "designed to strengthen and expand the capabilities of SBICs to finance small businesses so that they can increase their contribution to economic growth and job creation." 59 Fed. Reg. at 16955. However, Section 121.601, which was the SBA size standard cited in the Notice and the Second Report and Order, has not been modified by the SBA. For purposes of our generic competitive bidding rules, in consultation with the SBA, we will reexamine our \$6 million net worth/\$2 million annual profits definition in light of the SBA's recent action.

¹⁴⁷ Many other commenters set forth their recommendations on the appropriate small business definition for broadband PCS preferences. See, e.g., comments of Tri-State (\$5 million average annual operating cash flow), Luxcel (net worth not exceeding \$20 million), and Iowa Network (less than \$40 million in annual revenues).

¹⁴⁸ Some parties recommend using the SBA's alternative 1500 employee standard. See, e.g., comments of SBA Associate Administrator for Procurement Assistance at 2, CFW Communications at 2, and Iowa Network at 17. A number of other commenters, including the SBA's Chief Counsel for Advocacy, argue, however, that adoption of this alternative SBA definition would open up a huge loophole in the designated entity eligibility criteria.

174. We expect broadband PCS to be a highly capital intensive business requiring bidders to expend tens of millions of dollars to acquire a license and construct a system even in the smaller broadband PCS markets. Thus, we believe that our current small business definition is overly restrictive because it would exclude most businesses possessing the financial resources to compete successfully in the provision of broadband PCS services. Accordingly, we modify our small business definition for broadband PCS auctions to ensure the participation of small businesses with the financial resources to compete effectively in an auction and in the provision of broadband PCS services.

175. There is substantial support in the record for a \$40 million gross revenue standard. For example, the SBA recommends that for broadband PCS, a small business be defined as one whose average annual gross revenues for its past three years do not exceed \$40 million.¹⁴⁹ It states that this definition isolates those companies that have significantly greater difficulty in obtaining capital than larger enterprises. At the same time, the SBA contends that a company with \$40 million in revenue is sufficiently large that it could survive in a competitive wireless communications market.¹⁵⁰ Similarly, the SBA Chief Counsel for Advocacy asserts that a \$40 million threshold will allow participation by firms "of sufficient size to meet demands in almost all small markets and some medium-size markets without significant outside financial assistance."¹⁵¹ For purposes of broadband PCS, we shall therefore define a small business as any firm, together with its attributable investors and affiliates, with average gross revenues for the three preceding years not in excess of \$40 million.¹⁵² In

Specifically, they contend that telecommunications is a capital, rather than labor, intensive industry, and that an entity with 1,500 employees is likely to be extremely well capitalized and have no need for the special treatment mandated by Congress in the Budget Act. See, e.g., comments of SBA Chief Counsel for Advocacy at 8, LuxCel Group, Inc. at 4, Suite 12 Group at 10-11.

¹⁴⁹ Ex parte filing of U.S. Small Business Administration, June 24, 1994.

¹⁵⁰ Id.

¹⁵¹ Comments of SBA Office of Advocacy at 10. Cf. comments of Iowa Network and Telephone Electronics Corporation (advocating a \$40 million annual revenue criterion for telephone companies) and reply comments of North American Interactive Partners and Kingwood Associates (advocating \$40 million gross-revenue criterion for applicants for the fifty most-populous BTAs, based on estimated average build-out cost).

¹⁵² The establishment of small business size standards is generally governed by Section 3 of the Small Business Act of 1953, as amended, 15 U.S.C. § 642 (a). Recent amendments to that statute provide that small business size standards developed by Federal agencies must be based on the average gross revenues of such business over a period of not less than three years. See Pub. L. No. 102-366, Title II, § 222 (a), 106 Stat. 999 (1992); 15 U.S.C. § 632 (a) (2) (B) (ii).

addition, an applicant will not qualify as a small business if any one attributable investor in, or affiliate of, the entity has \$40 million or more in personal net worth.¹⁵³

176. For purposes of determining whether an entity qualifies as a small business, we will follow the control group and attribution rules set forth with regard to eligibility to bid in the entrepreneurs' blocks. In particular, winning bidders are required to identify on their long-form applications a control group that holds at least 50.1 percent of the voting interests of the applicant (and otherwise has de facto control) and owns at least a 25 percent equity stake. The gross revenues of each member of the control group and each member's affiliates will be counted toward the \$40 million gross revenue threshold, regardless of the size of the member's total interest in the applicant. The \$40 million personal net worth limitation will also apply to each member of the control group. We will not consider the gross revenues or personal net worth of any other investor unless the investor holds 25 percent or more of the outstanding passive equity in the applicant, which, as defined above, includes as much as five percent of the voting stock in a corporate applicant.

177. We also adopt the more relaxed attribution standard set forth in the entrepreneurs' blocks section with regard to investors in minority and female-owned applicants. Specifically, we will not consider the gross revenues or personal net worth of a single passive investor in a minority or female-owned small business unless the investor holds in excess of a 49.9 percent passive interest (which includes as much as five percent of a corporate applicant's voting stock), provided the women or minority control group maintains at least 50.1 percent of the equity and, in the case of a corporate applicant, at least 50.1 percent of the voting stock.¹⁵⁴ We believe that such revenue attribution will ensure that only bona fide small businesses are able to take advantage of the special provisions we have adopted, but will allow those businesses to attract sufficient equity capital to be truly viable contenders in the PCS industry.

178. These financial eligibility rules will continue to apply throughout the license term. Thus, firms that received bidding credits and "enhanced" installment payments based on their small business status will be subject to the repayment penalties outlined above, if an investor subsequently purchases an "attributable" interest (e.g. 25 percent or more of the firm's equity) and, as a result, the gross revenues of the firm exceed the \$40 million gross

¹⁵³ Unlike our eligibility criteria to bid in the entrepreneurs' blocks, we do not adopt a total assets standard here. We believe that the \$40 million gross revenue cap for small businesses, together with the \$500 million total asset threshold we set for entry into the entrepreneurs' blocks in the first instance, should be sufficient to ensure that only bona fide small businesses are able to take advantage of the measures intended for those designated entities.

¹⁵⁴ See supra ¶ 160.

revenues cap, or the personal net worth of the investor exceeds the \$40 million personal net worth threshold.

179. Finally, we will allow a consortium of small businesses to qualify for any of the measures adopted in this order applicable to individual small businesses. As used here, the term "consortium" means a conglomerate organization formed as a joint venture among mutually-independent business firms, each of which individually satisfies the definition of a small business.

180. Several commenters argue that a consortium should not qualify for special treatment unless the consortium itself meets the established definitional criteria.¹⁵⁵ They contend that the FCC should not allow consortia to be used as a means of circumventing the usual prerequisites for these special provisions. In the Second Report and Order, we concluded that consortia might be permitted to receive benefits based on participation in the consortium by one or more designated entities, but believed such a consortium should not be entitled to qualify for measures designed specifically for designated entities. As a general matter, we shall continue to adhere to that principle. We think, however, that in the broadband PCS service, allowing small businesses to pool their resources in this manner is necessary to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and to become strong broadband PCS competitors. Because of the exceptionally large capital requirements in this service, we agree with the SBA Chief Counsel for Advocacy that, so long as individual members of the consortium satisfy the definition of a small business, the congressional objective of ensuring opportunities for small businesses will be fully met. Individual small entities that join to form consortia, as distinguished from a single entity with gross revenues in excess of \$40 million, still are likely to encounter capital access problems and, thus, should qualify for measures aimed at small businesses. We do not believe however, that this congressional goal will be satisfied if special measures are allowed for consortia that are "predominantly" or "significantly" owned and/or controlled by small businesses, as recommended by several commenters.¹⁵⁶ This would have the effect of eviscerating our small business definitional criteria and would not further the ability of bona fide small businesses to participate in PCS services.

3. Definition of Women and Minority-Owned Business

181. As discussed above, we have taken steps in this order to address the special funding problems faced by minority and women-owned firms and thereby to ensure that these groups have the opportunity to participate and become strong competitors in the broadband

¹⁵⁵ See comments of McCaw at 21 and Myers at 6.

¹⁵⁶ See, e.g., comments of Rural Cellular Corp. at 2, Bell Atlantic at 17, NAMTEC at 19, and AT& T at 25-26.

PCS service.¹⁵⁷ We thus have adopted a tax certificate program for women and minorities to allow more sources of potential funding, have relaxed the attribution standard used to determine eligibility to bid for licenses on frequency blocks C and F, and have adopted special measures for installment payments and bidding credits.

182. As also indicated above, for purposes of implementing these steps, we have departed from the definition of a minority and woman-owned firm that was adopted in the Second Report and Order. There, we found generally that to establish ownership by minorities and women, a strict eligibility standard should be adopted that required minorities or women to have at least a 50.1 percent equity stake and a 50.1 percent controlling interest in the designated entity. Second Report and Order at ¶ 277; 47 C.F.R. § 1.2110(b)(2). For the broadband PCS auctions, we retain the requirement that minorities and/or women control the applicant and hold at least 50.1 percent of a corporate applicant's voting stock. However, to establish their eligibility for certain benefits, summarized below, we shall impose an additional requirement that, even where minorities and women hold at least 50.1 percent of the applicant's equity, other investors in the applicant may own only passive interests, which, for corporate applicants, is defined to include as much as five percent of the voting stock. In addition, provided that certain restrictions are met, we shall also allow women and minority-owned firms the option to reduce to 25 percent the 50.1 percent minimum equity amount that must be held.

183. We emphasized in the Second Report and Order that we did not intend to restrict the use of various equity financing mechanisms and incentives to attract financing, provided that the minority and women principals continued to own 50.1 percent of the equity, calculated on a fully-diluted basis, and that their equity interest entitled them to a substantial stake in the profits and liquidation value of the venture relative to the non-controlling principals. We noted, however, that different standards that meet the same objectives may be appropriate in other contexts. Second Report and Order at ¶ 278. In view of the evidence of discriminatory lending experiences faced by minority and women entrepreneurs and the exceptionally great financial resources believed to be required by broadband PCS applicants, we conclude that it is appropriate to allow more flexibility with regard to the 50.1 percent equity requirements for this service in order to open doors to more sources of equity financing for women and minority-owned firms.

¹⁵⁷ As noted in the Second Report and Order, the members of the following groups will be considered "minorities" for purposes of our rules: "[T]hose of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 980 n.8 (1978); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849, 489 n.1 (1982). Moreover, as adopted in the Second Report and Order, minority and women-owned businesses will be eligible for special measures only if the minority and women principals are also United States citizens.

184. We shall therefore allow women and minority-owned firms the following options. First, they may satisfy the general definition set forth in the Second Report and Order, which requires the minority and/or female principals to control the applicant, own at least 50.1 percent of its equity and, in the case of corporate applicants, hold at least 50.1 percent of the voting stock. Under this option, other investors may own as much as a 49.9 percent passive equity interest. As noted above regarding eligibility to bid in the entrepreneurs' blocks, passive equity in the corporate context means only non-voting stock may be held, or stock that includes no more than five percent of the voting interests.¹⁵⁸ For partnerships, the term means limited partnership interests that do not have the power to exercise control of the entity. In addition, as required in the Second Report and Order, all investor interests will be calculated on a fully-diluted basis, meaning that agreements such as stock options, warrants and convertible debentures generally will be considered to have a present effect and will be treated as if the rights thereunder already have been fully exercised.¹⁵⁹ We recognize that the requirement that other investors own only passive interests is a departure from the definition of a minority or women-owned business adopted in the Second Report and Order, but because of the very significant financial contribution that may be made by such other investors in designated entities, we believe that the passive equity requirement is appropriate as an additional safeguard to ensure that minorities and/or women retain control of the applicant.

185. As a second option, women and minority-owned firms may sell up to 75 percent of the company's equity, provided that no single investor may hold 25 percent or more of the firm's passive equity, which is defined in the same manner as above. For example, a corporation with 100 shares of voting stock and 100 shares of non-voting stock, with the 200 shares representing the total outstanding shares of the company, could qualify as a minority or women-owned business under the following circumstances. The minority or women principals would have to own at least 51 shares of voting stock, which satisfies the requirement that they have voting control and, in this case, also meets the requirement that

¹⁵⁸ For example, under this option, a corporate applicant with two classes of issued and outstanding stock, 100 shares of voting stock and 100 shares of non-voting stock, could sell to a single non-eligible entity 49.9 percent of the applicant's equity, consisting of 5 shares of the corporation's voting stock and 94 shares of its non-voting stock. Under this scenario, eligible minorities or women, in order to retain at least 50.1 percent of the value of all outstanding shares of the corporation's stock, must own all of the corporation's remaining shares of stock; that is, 95 shares of voting stock and six shares of non-voting stock.

¹⁵⁹ As also noted in the Second Report and Order, we will consider departing from the requirement that the equity of investors in minority and women-owned businesses must be calculated on a fully-diluted basis only upon a demonstration, in individual cases, that options or conversion rights held by non-controlling principals will not deprive the minority and women principals of a substantial financial stake in the venture or impair their rights to control the designated entity. See Second Report and Order at ¶ 277.

they hold at least 25 percent of the equity. Two other investors could each own 44 shares of non-voting stock and five shares of voting stock, which represents 24.5 percent of the company's equity for each of the shareholders. A third investor could own the remaining 12 shares of non-voting stock and five shares of the voting stock, or 8.5 percent of the equity. The remaining 34 shares of voting stock may be sold to other investors provided that no single investor owns more than five shares.

186. Whichever option is chosen, we will require establishment of a "control group" in much the same way we did for purposes of eligibility to bid in the entrepreneurs' blocks. Specifically, winning bidders, transferees or assignees must identify on their long-form applications a control group (consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and women) that has de jure and de facto control of the applicant and holds either at least 50.1 or 25 percent of the applicant's equity, depending upon which option is elected.

187. We believe that a modification of our 50.1 percent equity requirement will best achieve Congress' objective of providing effective and long-term economic opportunities for women and minority-owned firms in broadband PCS. At the same time, we shall maintain strict enforcement of the requirement that actual control reside with the qualified designated entities. Thus, to establish their eligibility for tax certificates, enhanced installment payments, bidding credits and relaxed cellular attribution rules, women and minority-owned applicants electing to use the 25 percent equity option may not in any instance allow an individual investor who is not in the control group to own more than a 25 percent passive equity interest. This restriction will apply even in circumstances in which allowing an investor to exceed these limitations would not result in the applicant's exceeding the gross revenues and other financial standards that apply to other bidders in the entrepreneurs' blocks and other situations involving financial caps. These structural safeguards, as well as the general requirement that other investors hold only passive interests in women and minority-owned applicants, will help to ensure that control truly remains with the women and minority designated entities.

188. For example, a women or minority-owned firm electing to use the 25 percent option may have a non-eligible investor with more than a 25 percent passive stake and still qualify to bid in the entrepreneurs' blocks or for benefits that apply to small businesses, as long as the attributable revenues of the investor do not cause the applicant to exceed the gross revenues/total assets caps. In these contexts, no additional restrictions are necessary, because women and minority-owned applicants, like other applicants, are eligible to bid in these blocks and to qualify as small businesses so long as they comply with the same restrictions on financial eligibility that apply to other applicants. Since the attribution rule itself operates to ensure compliance with size limitations, it is not necessary to impose additional restrictions on the size of interests held by investors with attributable interests. This firm will not qualify, however, for special measures applicable only to women and minority-owned businesses, such as "enhanced" installment payments or the 15 or 25 percent bidding credits, because it has a single non-eligible investor with more than a 25 percent passive interest. In circumstances in

which women and minorities are required to retain only 25 percent of the firm's equity, this additional structural restriction is appropriate because the objective in this context is to ensure not merely financial eligibility, but that women and minorities retain control of the license.

189. We set forth previously rules defining more explicitly the term "control" for purposes of determining whether a "control group" maintains de facto as well as de jure control of an applicant.¹⁶⁰ Those rules apply equally to the minority and women principals of minority and women-owned applicants. Consistent with our general policies with regard to women-owned applicants for purposes of our multiple ownership and cross-ownership rules in this broadcast context, we shall not adopt, at this time, any special rules or presumptions to determine whether women-owned applicants exercise independent control of their firms. See In the Matter of Clarification of Commission Policies Regarding Spousal Attribution, 7 FCC Rcd. 1920 (1992)

190. Our requirement that control rest with minorities and/or women and the clarifications above ensure that parties do not attempt to evade the statutory requirement to provide economic opportunities and ensure participation by businesses owned by these groups. We reaffirm our commitment to investigate all allegations of fronts, shams or other methods used by those who try to obtain a benefit to which they are not lawfully entitled. In this vein, we again admonish parties that we will conduct random pre and post-auction audits to ensure that applicants receiving these benefits are bona fide designated entities.

191. We also note here that we are departing from the provision in the Second Report and Order that bars publicly traded companies from qualifying as minority and woman-owned businesses for purposes of participating in auctions. Most of the steps taken to assist these designated entities in this Order (e.g., bidding credits and installment payments) are confined to winning bidders in the entrepreneurs' blocks, where there is a financial limit on the size of participants. Because of the expected large capital entry costs of broadband PCS, we believe that even publicly traded companies owned by women and minorities that qualify to bid in blocks C and F require additional measures, such as bidding credits and installment payments, to be able to participate successfully. We emphasize, however, that the exception to the attribution rules for publicly traded companies to be eligible to bid in the entrepreneurs' blocks does not apply here.¹⁶¹ To qualify for measures targeted exclusively to women and minority-owned businesses, a company must satisfy the definition set forth in this section.

192. As noted above, applicants owned by women and minorities must meet the

¹⁶⁰ See supra ¶ 164.

¹⁶¹ With regard to qualifying to bid in the entrepreneurs' blocks, we stated that we would not attribute the revenues or assets of an investor that owns up to 15 percent of a publicly traded applicant's voting stock. For privately held companies, the voting stock threshold is five percent. See supra ¶¶ 158, 163.

limitations on gross revenues, total assets and personal net worth to qualify for entry into the entrepreneurs' blocks. The size limitations do not apply, however, to all measures designed to assist applicants owned by minorities and/or women. The tax certificate policy applies to all broadband PCS licenses and is not limited to licenses in the entrepreneurs' blocks. Therefore, businesses owned by minorities and women need not meet the gross revenue and other financial restrictions to qualify for tax certificates. Similarly, the relaxed cellular attribution threshold for minority and woman-owned firms adopted in the Broadband PCS Reconsideration Order is not limited to the entrepreneurs' blocks. Thus, minority and women-owned firms that do not meet the gross revenues, total assets and net worth restrictions may nevertheless qualify for the 40 percent cellular attribution rule. But minority and women-owned firms must satisfy the Commission's structural ownership requirements to receive the benefits of tax certificates and the relaxed cellular attribution rule; that is, they are subject to the limitation that interests held by investors who are not women and minorities must be passive.

4. Definition of Rural Telephone Company

193. As discussed above, we have adopted several measures to assist rural telephone companies in the broadband PCS service. We decide here the definition of rural telephone companies who are eligible for those benefits. As explained below, for this service, we shall depart from the definition adopted in the Second Report and Order and define rural telephone companies as local exchange carriers having 100,000 or fewer access lines, including all affiliates.

194. As we pointed out in the Second Report and Order,¹⁶² most of those responding to our tentative conclusion in the Notice concerning the definition of a rural telephone company contended that the proposed definition, which was based on the standard contained in Section 63.58 of the Commission's Rules, was too restrictive. A variety of more inclusive definitions were recommended.¹⁶³ Some commenters advocated a definition in which a company would qualify if it satisfied either of two alternative criteria based on population of communities served or number of access lines.¹⁶⁴ Others advocated adoption of a definition

¹⁶² Second Report and Order at ¶¶ 279-282.

¹⁶³ See, e.g., comments of Saco River, Telephone Electronics, and Iowa Network (advocating amending the proposed definition merely by raising the population threshold to 10,000), and comments of Chickasaw (advocating definition including companies that predominantly, but not exclusively, serve customers in communities of less than 10,000 in non-urbanized areas).

¹⁶⁴ See, e.g., comments of Telocator, TDS, NYNEX, NOTA, NTCA and Saco River (recommending a definition including companies that either provide service only within communities of 10,000 or less in non-urbanized areas or provide 10,000 or fewer access lines (and no more than 150,000 in conjunction with affiliates)); comments of OPASTCO

focusing simply on the number of access lines provided.¹⁶⁵ One commenter advocated a definition focusing exclusively on revenues rather than access lines, with the standard for rural telephone company status at annual revenues under \$100 million.¹⁶⁶ In addition, some advocated a somewhat more restrictive definition.¹⁶⁷

195. Many commenters suggested limiting rural telephone eligibility to carriers serving communities with no more than 10,000 inhabitants, asserting that such a standard better comports with common notions about which telephone companies are "rural."¹⁶⁸ A number of other commenters supported a definition of rural telephone company that would include a limitation on the size of the company. OPASTCO, for example, asserted that such a limitation would comport with the statutory mandate to ensure opportunity for rural telephone companies because "the problem such companies face in the competitive bidding arena" is as much a function of their size as of the rural character of their service areas."¹⁶⁹ NTCA similarly contended that small companies have shown the interest and commitment needed to fulfill the explicit statutory goal of "rapid deployment of new . . . services for . . . those residing in rural areas," citing as support a report on the deployment of digital switching by small LECs.¹⁷⁰ Other parties suggested that we look to the unenacted antecedent of the Budget Act, S.1134, in which a rural telephone company was defined as an entity that either (a) "provides telephone exchange service by wire in a rural area" (i.e., a non-urbanized area containing no incorporated place with more than 10,000 inhabitants), (b) "provides telephone

(recommending defining rural telephone companies as those that either provide exchange service only within communities of 10,000 or less in non-urbanized areas or that provide 50,000 or fewer access lines; and comments of SBA Chief Counsel for Advocacy (recommending a definition including companies serving communities of 20,000 or less in non-urbanized areas or providing 50,000 or fewer access lines (including lines provided by affiliates)).

¹⁶⁵ See, e.g., comments of STCL, MEBTEL, CFW, Minnesota Equal Access Network, Rural Cellular Assn., Rural Cellular Corp., Rochester Tel. Corp, McCaw, DialPage, APC, TDS and Gulf Telephone Co. (suggesting caps between 25,000 and 150,000 access lines).

¹⁶⁶ Comments of PMN.

¹⁶⁷ See, e.g., comments of GTE (definition would apply only to companies that exclusively serve customers in communities of 10,000 or less in non-urbanized areas and that provide wireline exchange service to 10,000 or fewer customers).

¹⁶⁸ See, e.g., comments of OPASTCO, Iowa Network, Saco River and Telephone Electronics.

¹⁶⁹ Comments of OPASTCO at 5.

¹⁷⁰ Comments of NTCA at 7-8.

exchange service by wire to less than 10,000 subscribers," or (c) "is a telephone utility whose income accrues to a State or political subdivision thereof."

196. In the Second Report and Order, we adopted a definition of "rural telephone company" that includes independently owned and operated local exchange carriers that (1) do not serve communities with more than 10,000 inhabitants in the licensed area, and (2) do not have more than 50,000 access lines, including all affiliates. 47 C.F.R. § 1.2110(b)(3). We stated our belief that a limitation on the size of eligible rural telephone companies is appropriate because Congress did not intend for us to give special treatment to large LECs that happen to serve small rural communities. See Second Report and Order at ¶ 282.

197. Several parties who filed petitions for reconsideration of the Second Report and Order argue that the definition adopted for rural telephone companies may be too restrictive given the capital intensive nature of broadband PCS.¹⁷¹ We also note that NTCA argued in its comments in this proceeding that it is neither necessary nor appropriate to use the same criteria to define rural telephone companies in rules pertaining to different services, technologies, and industries.¹⁷² Likewise, in an ex parte letter, OPASTCO states that by defining rural telephone company for purposes of broadband PCS as a local exchange carrier with less than \$100 million in revenue, the Commission will properly capture in the defined class locally-owned telephone companies who are truly interested in providing services to rural areas.¹⁷³ OPASTCO notes that the "same universe of companies" that would fall under such a revenue threshold would be captured by a definition that includes all telephone companies having 100,000 or fewer access lines.¹⁷⁴

198. Our challenge in establishing a definition of a rural telephone company for broadband PCS is to achieve the congressional goal of promoting the rapid deployment of this new service in rural areas by targeting only those telephone companies whose service territories are predominantly rural in nature, and who are thus likely to be able to use on their existing wireline telephone networks to build broadband PCS infrastructures to serve rural America. For purposes of our rules governing broadband PCS licenses, we believe that this goal can best be achieved if we define rural telephone companies as those local exchange carriers having 100,000 or fewer access lines, including all affiliates. We agree with OPASTCO that such a definition will include virtually all of the telephone companies who

¹⁷¹ See, e.g., petitions of South Dakota Network (SDN), U.S. Intelco, NTCA, Rural Cellular Association and TDS. We note that similar arguments have been made with respect to other services.

¹⁷² See comments of NTCA at 4.

¹⁷³ Ex parte filing of filing of OPASTCO, June 2, 1994, at 2; see also comments of PMN at 7-8.

¹⁷⁴ Id.

genuinely are interested in providing services to rural areas. This definition will encourage participation by legitimate rural telephone companies without providing special treatment to large LECs. Therefore, we will better achieve the congressional goal of providing service rapidly to rural areas without giving benefits to large companies that do not require such assistance. Rural telephone companies that satisfy this definition thus will be eligible for rural partitioning, as discussed above.¹⁷⁵

199. Anchorage Telephone Company argues in a petition for reconsideration of the Second Report and Order that our definition of a rural telephone company should include telephone companies that are owned by governmental authorities. Anchorage contends that Congress meant to mandate special consideration not only for telephone carriers serving rural areas but also for all municipally-owned telcos, even those with wholly or predominantly urban service areas.¹⁷⁶ This argument is based on its interpretation of the Senate bill that was antecedent to the enacted Budget Act. Anchorage argues that the Senate bill containing the prototype of a mandate for special consideration for rural telephone companies directed the FCC to grant "rural program licenses" to "qualified" common carriers and explicitly said that the category of "qualified" carriers included all state-owned and municipally-owned telephone companies. Anchorage further states that the report of the conference committee that drafted the Budget Act declares that the Senate's "findings" are incorporated by reference.¹⁷⁷ Anchorage also asserts that without the aid of special assistance it and most other state-owned and municipal telcos won't be able to purchase spectrum licenses at auction because it is politically infeasible for them to generate and retain enough surplus revenue to fund such investments, due to popular aversion to increases in taxes or telephone rates.¹⁷⁸

200. We find no merit in Anchorage's arguments. There is no specific evidence that Congress intended the term "rural telephone companies" to include all state or municipally-owned telephone companies. To the contrary, the fact that an antecedent bill contained an explicit mandate for preferential treatment of government-owned telephone companies that was deleted from the enacted bill could just as easily be interpreted as an indication that Congress rejected such a rule. Further, we disagree that state and municipal governments lack the means to participate successfully in auctions. Such governments have substantial capabilities to raise funds through private financing, bond offerings and taxation. Therefore, our definition of a rural telephone company will not encompass telephone companies that are owned by government authorities.

¹⁷⁵ Such companies also will be eligible for special treatment under our cellular attribution rules for broadband PCS. See 47 C.F.R. § 24.204(d)(2)(ii).

¹⁷⁶ Anchorage Petition at 2-3.

¹⁷⁷ Id.

¹⁷⁸ Id. at 4-5.

5. Definition of an Affiliate

201. Many of the eligibility criteria set forth above are based on the size of the entity applying for a broadband PCS license and/or seeking special treatment under our designated entity policies. Each of these size standards (\$125 million gross revenues/\$500 million total assets/\$100 million personal net worth, \$40 million gross revenues/\$40 million personal net worth, and 100,000 access lines) requires applicants to include, among other parties, "affiliates" when calculating their attributable gross revenues, total assets, net worth or access lines. This affiliation requirement is intended to prevent entities that, for all practical purposes, do not meet these size standards from receiving benefits targeted to smaller entities.¹⁷⁹ We adopt specific affiliation rules for purposes of applying these eligibility criteria based in part on the Small Business Administration's affiliation rules.¹⁸⁰

202. In the Second Report and Order, we referenced the SBA's affiliation rules for purposes of defining generally whether an entity qualifies as a small business and gave examples of how the affiliation rules would be applied. We continue to believe that the SBA's affiliation rules provide a solid foundation on which to build our own affiliation rules for purposes of the small business definition for broadband PCS and for the other size standards adopted in this order.¹⁸¹ Accordingly, for purposes of these eligibility restrictions, we will again borrow from the SBA's rules for outside affiliations. In addition, to ensure that applicants have clear guidance concerning these matters, we shall include in our rules more detailed information concerning the circumstances in which an entity will be deemed an affiliate of the applicant.

203. Like the eligibility rules we have adopted here governing size limitations for broadband PCS, the SBA's rules provide that size determinations shall include the applicant and all of its "affiliates."¹⁸² At the outset, before considering in more detail all the types of affiliations that might exist when guided by the SBA rules, we review briefly our own rules described above, concerning attributable interests. Those rules provide that, so long as a control group is established, the gross revenues, assets or net worth of an investor in a PCS applicant or licensee will be attributed to the applicant or licensee only if the investor holds more than 25 percent of the applicant's passive equity or is part of a control group that

¹⁷⁹ See, e.g., Second Report and Order at ¶ 272.

¹⁸⁰ See 13 C.F.R. § 121.401 (1993) (formerly at 13 C.F.R. § 121.3 (1989)).

¹⁸¹ SBA's affiliation rules were promulgated under the authority in Section 3 of the Small Business Act of 1953, as amended, 15 U.S.C. § 632, which provides that, to be eligible for benefits provided by SBA and other agencies, a "small-business concern" must be "independently owned and operated." See Small Business Size Standards, 54 Fed. Reg. 52634 (December 21, 1989).

¹⁸² See 13 C.F.R. § 121.401(a).

controls the applicant. Therefore, only where an investor has such attributable interests in the broadband PCS applicant or licensee do we need to examine whether the investor has a relationship with other persons or outside entities that rises to the level of an affiliation with the PCS applicant, and if so, whether the affiliate's revenues or net worth, when aggregated with the applicant's, exceed our size eligibility thresholds.

204. General Principles of Affiliation. When such an attributable interest exists, an affiliation under the SBA rules would arise, first, from "control" of an entity or the "power to control it." Thus, under the SBA rules, entities are affiliates of each other when either directly or indirectly (i) one concern controls or has the power to control the other, or (ii) a third party or parties controls or has the power to control both. 13 C.F.R. § 121.401(a)(2)(i), (ii). In determining control, the SBA's rules provide generally that every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. The rules, in addition, provide specific examples of where control resides under various scenarios, such as through stock ownership or occupancy of director, officer or management positions. The rules also articulate general principles of control, and note, for example, that control may be affirmative or negative and that it is immaterial whether control is exercised so long as the power to control exists. *Id.* § 121.401(c)(1). Second, an affiliation, under SBA rules, may also arise out of an "identity of interest" between or among parties. *Id.* § 121.401(a)(2)(iii), (d). We shall adopt these same general provisions in our affiliation rules for broadband PCS.

205. In adopting these affiliation rules, we emphasize that these rules will not be applied in a manner that defeats the objectives of our attribution rules. Our attribution rules expressly permit applicants to disregard the gross revenues, total assets and net worth of passive investors, provided that an eligible control group has de facto and de jure control of the applicant. Our attribution rules are designed to preserve control of the applicant by eligible entities, yet allow investment in the applicant by entities that do not meet the size restrictions in our rules. Therefore, so long as the requirements of our attribution rules are met, the affiliation rules will not be used to defeat the underlying policy objectives of allowing such passive investors. More specifically, if a control group has de facto and de jure control of the applicant, we shall not construe the affiliation rules in a manner that causes the interests of passive investors to be attributed to the applicant.

206. Applying these SBA affiliation rules, an affiliation would arise, for example, where an entity with an attributable interest in a broadband PCS applicant is under the control of another entity. An affiliation would also arise where an entity with an attributable interest in a broadband PCS applicant controls, or has the power to control, another entity. For example, if a 10 percent voting shareholder of a PCS applicant is also a shareholder in a large Corporation X, when should Corporation X be deemed an affiliate of the PCS applicant as a result of the shareholder's ownership interest in both entities? Under the SBA rules and the rules we adopt here, Corporation X would be deemed an affiliate of the applicant if the shareholder controlled or had the power to control Corporation X, in which case, Corporation X's gross revenues must be included in determining the applicant's gross revenues.

207. For purposes of determining control, ownership interests will be calculated on a fully-diluted basis. Thus, for example, stock options, convertible debentures, and agreements to merge (including agreements in principle) will generally be considered to have a present effect on the power to control or own an interest in either an outside entity or the PCS applicant or licensee.¹⁸³ We will treat such options, debentures, and agreements generally as though the rights held thereunder had been exercised.¹⁸⁴ However, an affiliate cannot use such options and debentures to appear to terminate its control over or relationship with another concern before it actually does so.¹⁸⁵

208. Voting and Other Trusts. In a similar vein, we also borrow from the SBA's rules and our own rules in other services to find affiliation under certain voting trusts in order to prevent a circumvention of eligibility rules. The SBA's rules provide that a voting trust, or similar agreement, cannot be used to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control an outside concern,

¹⁸³ We recognize that we have adopted a different rule for purposes of our broadband PCS-cellular ownership rules. See 47 C.F.R § 24.204(d)(2)(v). In that context, however, our purpose was not to establish the financial position, or potential financial position, of applicants bidding in auctions.

¹⁸⁴ See 13 C.F.R § 121.401(f). SBA's rules provide the following examples to guide the application of this provision:

Example 1. If company "A" holds an option to purchase a controlling interest in company "B," the situation is treated as though company "A" had exercised its rights and had become owner of a controlling interest in company "B." The [annual revenues] of both concerns must be taken into account in determining size.

Example 2. If company "A" has entered into an agreement to merge with company "B" in the future, the situation is treated as though the merger has taken place. [A and B are affiliates of each other].

¹⁸⁵ Id. SBA's rules provide this example:

If large company "A" holds 70% (70 of 100 outstanding shares) of the voting stock of company "B" and gives a third party an option to purchase 66 of the 70 shares owned by A, company "B" will be deemed to be an affiliate of company "A" until the third party actually exercises its option to purchase such shares. In order to prevent large company "A" from circumventing the intent of the regulation which [gives] present effect to stock options, the option is not considered to have present effect in this case.

if the primary purpose of the trust is to meet size eligibility rules.¹⁸⁶ Similarly, under the Commission's broadcast multiple ownership rules, stock interests held in trust may be attributed to any person who holds or shares the power to vote such stock, has the sole power to sell such stock, has the right to revoke the trust at will or to replace the trustee at will.¹⁸⁷ Also, under the broadcast rules, if a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary of a trust, the stock interests held in trust will be considered assets of the grantor or beneficiary, as appropriate.¹⁸⁸ Because we believe the broadcast rules provide more definitive guidance in this particular area, we shall use them as a model for the affiliation rules adopted here. Thus, for example, if an investor with an attributable interest in a PCS applicant holds a beneficial interest in stock of another firm that amounts to a controlling interest in that other firm, depending on the identity of the trustee, the other firm may be considered an affiliate and its assets and gross revenues may be attributed to the PCS applicant.

209. Officers, Directors and Key Employees. Under the SBA's affiliation rules, affiliations also generally arise where persons serve as the officers, directors or key employees of another concern and they represent a majority or controlling element of that other concern's board of directors and/or management of the outside entity.¹⁸⁹ We shall adopt an identical rule. Thus, if a person with an attributable interest in a broadband PCS applicant, through his or her other key employment positions or positions on the board of another firm, controls that other firm, then the other firm will be considered an affiliate of the applicant. Such affiliations may or may not result in the applicant's exceeding our size limitations. As this rule reflects, for purposes of attributing the financial position of an outside entity in this context, officers and directors of an outside concern are not foreclosed entirely from holding attributable or non-attributable interests in a PCS applicant. Whether or not such persons control the outside entity, we also do not want to prohibit these persons, who may be experienced in the telecommunications, finance, or communications and equipment industries, from assisting start-up companies in PCS by serving as officers or directors of the applicant. Thus, under our general attribution rule, if such persons serving as officers or directors of the applicant do not control the applicant or otherwise have an attributable interest in the applicant, their outside affiliations (even if controlling) will not be considered at all for

¹⁸⁶ 13 C.F.R. § 121.401(g).

¹⁸⁷ See 47 C.F.R. § 73.3555 note 2(e).

¹⁸⁸ Id.

¹⁸⁹ See 13 C.F.R. § 121.401(h). A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern. 13 C.F.R. § 121.405.

purposes of determining the applicant's eligibility under our rules.¹⁹⁰

210. Affiliation Through Identity of Interest: Family and Spousal Relationships. As expressed in the SBA's rules, an affiliation may arise not only through control, but out of an "identity of interest" between or among parties. See 13 C.F.R. § 121.401(a)(2)(iii). For example, affiliation can arise between or among members of the same family or persons with common investments in more than one concern. In determining who controls or has the power to control an entity, persons with an identity of interest may be treated as though they were one person. *Id.* at § 121.401(d). For example, if two shareholders in Corporation X are both attributable shareholders in the PCS applicant, to the extent that together they have the power to control Corporation X, Corporation X may be deemed an affiliate of the applicant.

211. Similarly, as under the SBA rules, we must consider spousal and other family relationships in determining whether an affiliation exists. Under the SBA rules for determining small business status, for example, members of the same family may be treated as though they were one person because they have an "identity of interest." 13 C.F.R. § 121.401(d). Likewise, in order to determine whether individuals are economically disadvantaged, the SBA rules governing eligibility for participation in the government's "section 8(a)" program for socially and economically disadvantaged small businesses have special provisions for attributing spousal interests. The latter rules provide generally that half of the jointly-owned interests of an applicant and his or her spouse must be attributed to the applicant for purposes of determining the applicant's net worth. See 13 C.F.R. § 124.106(a)(2)(i)(A)(1).

212. In the context of the auction eligibility rules at issue here, we begin by clarifying that our reason for considering spousal and kinship relationships is not to determine whether the spouse or other kin of a woman-owned applicant actually is controlling the applicant, thereby violating our eligibility rules for woman-owned businesses. As discussed above, our rules do not embody any presumptions concerning spousal control in that context.¹⁹¹ Rather, our objective here is to ensure both that entities permitted to bid in the entrepreneurs' blocks are actually in need of special financial assistance and that otherwise ineligible entities do not circumvent the rules prohibiting entry by funding family members that purport to be eligible

¹⁹⁰ SBA's size standard affiliation rules also provide that affiliations can arise in a variety of other scenarios, such as where one concern is dependent upon another for contracts and business, where firms share joint facilities, or have joint venture or franchise license agreements. To the extent we believe these rules may have general applicability in the context of our policies for broadband PCS, we shall codify them in our affiliate rules. We caution parties that issues relating to de facto control of the applicant (or parties with attributable interests in the applicant) could also arise under arrangements not expressly codified in the rules.

¹⁹¹ See supra ¶ 189.

applicants.

213. In formulating these rules, we need to consider also that, as a practical matter, it will not be possible for us prior to the auctions to resolve all questions that pertain to the individual circumstances of particular applicants. Furthermore, if we determine subsequent to an auction that a winning bidder in fact was ineligible to bid because of spousal or kinship relationships, not only will authorization of service be delayed but, as discussed above, disqualified applicants may be subject to substantial penalties. In these circumstances, we think that the public interest requires that we endeavor, insofar as possible, to establish bright-line tests for determining when the financial interests of spouses and other kin should be attributed to the applicant.

214. We have decided that, for purposes of determining whether the financial limitations in our eligibility rules have been met, we will in every instance attribute the financial interests of an applicant's spouse to the applicant. This will resolve any concern that an applicant might transfer his or her assets to a spouse in order to satisfy the personal net worth or control restrictions that apply to eligible entities. For example, an applicant could not transfer stock or other assets to his or her spouse and thereby dispose of interests that, if held by the applicant, would render the applicant ineligible. Just as importantly, this approach will resolve any concern that an applicant might participate in bidding in the entrepreneurs' blocks by using the personal assets of an ineligible spouse, which would defeat entirely the objective of excluding very large entities from bidding in these blocks.

215. In adopting this rule, we fully recognize that instances could arise in which, if all factors were considered, attributing a spouse's financial interests to the applicant could lead to harsh results. As a general matter, however, we think it provides a workable bright-line standard that resolves fully our policy concerns and avoids undesirable ambiguity concerning the nature of our requirements. As in the SBA rules, however, one exception is clearly warranted; this affiliation standard would not apply if the applicant and his or her spouse are subject to a legal separation recognized by a court of competent jurisdiction. In calculating their personal net worth, investors in the applicant who are legally separated must, of course, still include their share of interests in community property held with a spouse.

216. As indicated above, circumstances could also arise in which other kinship relationships are used as a means to evade our eligibility requirements. Because we believe kinship relationships in many cases do not present the same potential for abuse that exists with spousal relationships, particularly in terms of the "identity of interests" that are likely to exist between the persons involved, we shall adopt a more relaxed standard for determining when kinship interests must be attributed to applicants. In this area, we shall follow the same standard that is applied by the SBA when interpreting its "identity of interest" rule described above. Specifically, an identity of interests between family members and applicants will be presumed to exist, but the presumption can be rebutted by showing that the family members are estranged, or that their family ties are remote, or that the family members are not closely related in business matters. See generally Texas-Capital Contractors, Inc. v. Abdnor, 933 F.2d

261 (5th Cir. 1990). For purposes of determining who is a family member under this rule, we shall use a definition that is identical to the definition of "immediate family member" in the SBA's rules, 13 C.F.R. § 124.100.

217. In appropriate cases, an applicant should be able to rebut the presumption regarding kinship affiliations with relative ease, simply by demonstrating that the applicant has no close relationship in business matters with the relevant family members. Of course, should such business relationships arise with a winning applicant after the auction, we might need to consider whether the applicant intended to circumvent the requirements of our eligibility rules. Our holding period rule, which, as discussed above, requires that winning bidders in the entrepreneurs' blocks maintain an ownership structure meeting our eligibility requirements for five years, will serve as an additional safeguard against possible abuses arising from kinship relationships.

VIII. CONCLUSION, PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Conclusion

218. In fashioning rules for competitive bidding for broadband PCS licenses, we seek to promote the public policy goals set forth for us by Congress. We believe that the rules adopted in this Fifth Report and Order satisfy this objective. These rules should facilitate the rapid implementation of new broadband communications services through advanced technologies and efficient spectrum use, thus advancing the public interest by providing consumers with competitive and innovative wireless voice and data services and also fostering economic growth. The rules will allow for the public to recover a portion of the value of the public spectrum, and will promote access to broadband PCS services by consumers, producers and new entrants by ensuring that small businesses, rural telephone companies and businesses owned by minorities and women will have genuine opportunities to participate in the auctions and in the provision of service. We expect that the advent of PCS will benefit consumers by raising the overall level of competition in many already competitive segments of the telecommunications industry and providing competition in others for the first time, promote job creation in the communications and information sector of the domestic economy, and enhance productivity and efficiency in industry as a whole.

B. Final Regulatory Flexibility Analysis

219. Pursuant to the Regulatory Flexibility Act of 1980, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making in PP Docket No. 93-253. Written comments on the IRFA were requested. The Commission's final analysis is as follows:

220. Need for and purpose of the action. This rule making proceeding was initiated to implement Section 309(j) of the Communications Act, as amended. The rules adopted

herein will carry out Congress's intent to establish a system of competitive bidding for broadband PCS licenses. The rules adopted herein also will carry out Congress's intent to ensure that small businesses, rural telephone companies, and businesses owned by women and minorities are afforded an opportunity to participate in the provision of spectrum-based services.

221. Issues raised in response to the IRFA. The IRFA noted that the proposals under consideration in the NPRM included the possibility of new reporting and recordkeeping requirements for a number of small business entities. No commenters responded specifically to the issues raised in the IRFA. We have made some modifications to the proposed requirements as appropriate.

222. Significant alternatives considered and rejected. All significant alternatives have been addressed in the Fifth Report and Order.

C. Ordering Clauses

223. Accordingly, IT IS ORDERED that Part 24 of the Commission's Rules is amended as set forth in the attached Appendix B.

224. IT IS FURTHER ORDERED that the rules changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

COMMENTS AND REPLY COMMENTS FILED IN PP DOCKET NO. 93-253

Comments

- 1 Advanced Mobilcomm Technologies, Inc., and Digital Spread Spectrum Technologies, Inc.
- 2 James Aidala
- 3 Oye Ajayi-Obe
- 4 Alcatel Network Systems, Inc. (Alcatel)
- 5 AllCity Paging, Inc. (AllCity)
- 6 Alliance for Fairness and Viable Opportunity (Alliance for Fairness)
- 7 Alliance of Rural Area Telephone & Cellular Service Providers (ARAT)
- 8 Alliance Telecom, Inc.
- 9 Alpine Electronics and Communication (Alpine)
- 10 American Automobile Association (AAA)
- 11 American Mobile Satellite Corp. (AMSC)
- 12 American Mobile Telecommunications Association (AMTA)
- 13 American Personal Communications (APC)
- 14 The American Petroleum Institute (API)
- 15 American Wireless Communication Corporation (AWCC or American Wireless)
- 16 American Women in Radio and Television, Inc. (AWRT)
- 17 Ameritech
- 18 AMSC Subsidiary Corporation
- 19 Anchorage Telephone Utility (Anchorage)
- 20 Charles N. Andreae/Andreae & Associates, Inc.
- 21 John G. Andrikopoulos, et al.
- 22 Arch Communications Group, Inc. (Arch Communications)
- 23 Association for Maximum Service Telecasters & National Association of Broadcasters
- 24 (MSTV/NAB)
- 25 Association of American Railroads (AAR)
- 26 Association of America's Public Television Stations (APTS)
- 27 Association of Independent Designated Entities (AIDE)
- 28 Association of Public-Safety Communications Officials International, Inc. (APCO)
- 29 AT&T
- 30 Baraff, Koerner, Olender & Hochberg, P.C.
- 31 Bechtel & Cole
- 32 Bell Atlantic Personal Communications, Inc. (Bell Atlantic)
- 33 BellSouth Corp., BellSouth Telecommunications, Inc., BellSouth Cellular Corp., and
Mobile Communications Corporation of America (BellSouth)
- 33 Jeffrey T. Bergner
- 34 Art Boroughs
- 35 Van R. Boyette
- 36 D.B. Branch

- 37 Quentin L. Breen
- 38 Dennis C. Brown and Robert H. Schwaninger (Brown and Schwaninger)
- 39 Cablevision Industries, Comcast Corp., Cox Cable Communications, and Jones Intercable,
- 40 Inc.
- 41 Calcell Wireless, Inc. (Calcell)
- 42 California Microwave, Inc. (California Microwave)
- 43 California Public Utilities Commission (CPUC)
- 44 Call-Her, L.L.C. (Call-Her)
- 45 Capitol Hill Management
- 46 Catapult Communications (Catapult)
- 47 Cellular Communications, Inc. (CCI)
- 48 Cellular Service, Inc. (CSI)
- 49 Cellular Settlement Groups
- 50 Cellular Telecommunications Industry Association (CTIA)
- 51 Cencall Communications Corp. (Cencall)
- 52 Century Communications Corp. (Century)
- 53 CFW Communications Corp., Denver and Ephrata Tel. and Tel. Co., and Lexington Tel.
- 54 Co.
- 55 Chase Communications Corp. (Chase)
- 56 The Chase McNulty Group, Inc. (Chase McNulty)
- 57 Chickasaw Telephone Company (Chickasaw)
- 58 Citizens Utility Company (Citizens)
- 59 Coalition for Equity in Licensing
- 60 Cole, Raywid & Braverman
- 61 Wendy C. Coleman d/b/a WCC Cellular (WCC Cellular)
- 62 Comcast Corporation (Comcast)
- 63 Comsat Corporation (Comsat)
- 64 ComTech Associates, Inc. (Comtech)
- 65 Converging Industries
- 66 Cook Inlet Region, Inc. (Cook Inlet)
- 67 Corporate Technology Partners (CTP)
- 68 Council of 100
- 69 Cox Enterprises, Inc. (Cox)
- 70 Thomas Crema
- 71 Data Link Communications (Data Link)
- 72 Devsha Corporation
- 73 Dial Page, Inc.
- 74 Steven L. Dickerson
- 75 Abby Dilley
- 76 Diversified Cellular Communications (Diversified)
- 77 Domestic Automation Company (Domestic Automation)
- 78 Laura G. Dooley
- 79 John Dudinsky
- 80 Mark H. Duesenberg
- 81 John R. Duesenberg

82 Duncan, Weinberg, Miller & Pembroke, P.C.
 83 Economics and Technology, Inc.
 84 FiberSouth, Inc. (FiberSouth)
 85 First Cellular of Maryland
 86 Firstcom, Inc.
 87 Fisher, Wayland, Cooper and Leader (Fisher Wayland)
 88 David F. Gencarelli, Esq.
 89 Janet B. Gencarelli
 90 General Communications, Inc. (GCI or General Communications)
 91 GEOTEK Industries, Inc. (GEOTEK)
 92 Debra Gervasini
 93 Martin Charles Gleyier
 94 GTE Services Corp. (GTE)
 95 GVNW, Inc./Management (GVNW)
 96 John G. Heard
 97 Hughes Communications Galaxy, Inc. & DirecTv, Inc. (DirecTv)
 98 Hughes Transportation Management Systems (Hughes)
 99 Independent Cellular Consultants
 100 Independent Cellular Network, Inc.
 101 Industrial Telecommunications Association, Inc.
 102 Intelligent Vehicle-Highway Society of America
 103 Interdigital Communications Corporation (Interdigital)
 104 Iowa Network Services, Inc. (Iowa Network)
 105 IVHS America
 106 JAJ Cellular
 107 Thomas J. Jasien
 108 JBS & Associates/Shrader Real Estate
 109 JMP Telecom Systems, Inc.
 110 Andrea J. Johnson
 111 Edward M. Johnson
 112 E.F. Johnson Company
 113 Jeff Johnston
 114 Clair Joyce
 115 Abraham Kye, et al.
 116 Ward Leber & Eroca Daniel
 117 Michael Lewis
 118 Liberty Cellular, Inc. d/b/a Kansas Cellular (Liberty Cellular)
 119 Lightcom International, Inc. (Lightcom)
 120 Daniel R. Lindemann
 121 Loral Qualcomm Satellite Services, Inc. (Loral)
 122 Robert Lutz, et al.
 123 Walter Lowman
 124 LuxCel Group, Inc. (LuxCel)
 125 John J. Mandler
 126 McCaw Cellular Communications, Inc. (McCaw)

127 MCI Telecommunications Corporation (MCI)
 128 MEBTEL, Inc.
 129 Mercury Communications, L.C. (Mercury)
 130 Millin Publications, Inc. (Millin)
 131 Minnesota Equal Access Network Services, Inc. (Minnesota Equal Access)
 132 Minority Business Enterprise Legal Defense and Education Fund, Inc. (MBELDEF)
 133 Minority PCS Coalition (Transworld Telecommunications Inc., Progressive
 134 Communications, Inc.,
 Carl and Gail Davis and John Washington)
 132 Motorola, Inc. (Motorola)
 133 Motorola Satellite Communications, Inc. (Motorola Satcom)
 134 George E. Murray
 135 MW TV, Inc.
 136 Law Offices of Richard S. Myers (Richard S. Myers)
 137 National Association of Black-Owned Broadcasters, Inc. (NABOB)
 138 National Association of Business and Educational Radio, Inc. (NABER)
 139 National Association of Minority Telecommunications Executives and Companies
 140 (NAMTEC)
 141 National Rural Telecom Association (NRTA)
 142 National Telecommunications and Information Administration of the U.S. Department of
 143 Commerce (NTIA)
 144 National Telephone Cooperative Association (NTCA)
 145 Nextel Communications, Inc. (Nextel)
 146 NYNEX Corporation (NYNEX)
 147 M. Kathleen O'Conner
 148 Organization for the Protection and Advancement of Small Telephone Companies
 149 (OPASTCO)
 150 Pacific Bell and Nevada Bell (PacBell)
 151 Pacific Telecom Cellular, Inc. (Pacific Telecom Cellular)
 152 PacTel Corporation (PacTel)
 153 PacTel Paging and MidContinent Media (Joint Comments) (PacTel Paging)
 154 PageMart, Inc. (PageMart)
 155 Paging Network, Inc. (PageNet)
 156 Palmer Communications, Inc. (Palmer)
 157 Michael Pernecke
 158 Raegene Pernecke
 159 Personal Communications Network Services of New York
 160 Jeffrey Peterson
 161 Phase One Communications, Inc. (Phase One)
 162 David Pines
 163 PMN, Inc. (PMN)
 164 PNC Cellular, Inc.
 165 Point Communications Company (Point)
 166 Primosphere Limited Partnership (Primosphere)
 167 Quick Call Group (Quick Call)

168 Radio Telecom and Technology, Inc. (RTT)
 169 RAM Mobile Data USA Limited Partnership (RAM)
 170 RAY Communications, Inc.
 171 Michael R. Rickman
 172 Roamer One, Inc. (Roamer One)
 173 Rochester Telephone Corp.
 174 Rocky Mountain Telecommunications Association and Western Rural Telephone
 175 Association
 176 Rural Cellular Association
 177 Rural Cellular Corp.
 178 Rural Electrification Administration, U.S. Department of Agriculture (REA)
 179 Rural Telephone Company
 180 Thomas Salmon
 181 Santarelli, Smith & Carroccio
 182 Michael Sauls
 183 Securicor PMR Systems, Ltd. (Securicor)
 184 Stephan C. Sloan
 185 Small Business PCS Association
 186 Small RSA Operators
 187 Small Telephone Companies of Louisiana
 188 Laquita Smallwood
 189 Southwestern Bell Corporation (Southwestern Bell)
 190 Sprint Corporation (Sprint)
 191 Henry J. Staudinger
 192 James F. Stern
 193 Arlene F. Strege
 194 Suite 12 Group
 195 Systems Engineering, Inc.
 196 Taxpayers Assets Project
 197 Telephone and Data Systems, Inc. (TDS)
 198 Telephone Association of Michigan (TAM)
 199 Telephone Electronics Corp. (Telephone Electronics)
 200 Telepoint Personal Communications, Inc (Telepoint).
 201 The Telmarc Group and Telmarc Telecommunications, Inc. (Telmarc)
 202 Telocator -- The Personal Communications Industry Association (Telocator)
 203 Thumb Cellular Limited Partnership (Thumb)
 204 Time Warner Telecommunications (Time Warner)
 205 Tri-State Radio Company (Tri-State)
 206 TRW, Inc. (TRW)
 207 Unique Communications Concepts (Unique)
 208 United Native American Telecommunications, Inc.
 209 U.S. Intelco Networks, Inc. (U.S. Intelco)
 210 U.S. Small Business Administration -- Chief Counsel for Advocacy (SBA)
 211 U.S. Small Business Administration -- Associate Administrator for Procurement Assistance
 212 U.S. Telephone Association (USTA)